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THE MARCH OF LAW : 1948

The importance and value of precedents can never be minimised. Though many of the decisions in a year may merely follow previous precedents yet they add to the weight of authority for questions of law decided while the few that lay down the law for the first time become in their turn valuable precedents for the years to come. Hence it would not be out of place—nay, it may be said to be even very appropriate—that at the commencement of a new year there should be a survey of the progress of law as indicated in the decisions of the year that is past. The following pages are intended to be merely as a recapitulation and review of most of the decisions of the Privy Council, the Federal Court and the Madras High Court during 1948.

High Court : Its Powers and Jurisdiction.—The anomaly and hardship resulting from the decision of the Judicial Committee in the *Parlakimedi case*[1] was commented upon in *Vedachala Mudaliar* v. *The Central Traffic Board, Madras*[2], where the High Court had to consider whether it had jurisdiction to issue a writ of *certiorari* to quash the order passed by the Central Traffic Board appointed under the Motor Vehicles Act and having its office in Madras. The latter body had allowed an incompetent appeal and cancelled the permission granted to a transport company to run its buses from Madras to Mahabalipuram along a particular route. The High Court held that the body whose order was being challenged was located in Madras and had passed the order within the limits of the original jurisdiction of the High Court and further as Madras was a terminus on the bus route the transport business must be considered as being carried on at least in part in Madras and as such it could not be said that the High Court had no jurisdiction to issue the writ to quash the order of the Central Board. At the end of the judgment it was remarked " It is a matter for consideration that persons within the limits of the original jurisdiction of this Court should have a remedy to approach this Court for the issue of a *certiorari* to quash illegal orders and orders made without jurisdiction, but that in respect of similar orders relating to subject-matter outside the original jurisdiction of this Court such a remedy should be denied to parties outside its original jurisdiction. Whatever historical accidents might justify the ruling of the Judicial Committee in the *Parlakimedi case*[1], there is no reason why the anomaly resulting therefrom should be allowed to continue." Soon after this decision was rendered, the High Court had again to consider in *French India Central Transport, Ltd.*, In re[3], the applicability the principles laid down in the *Parlakemedi case*[1]. The application in that case was for the issue of a writ of *certiorari* to call for the records of the Central Traffic Board, Madras, and quash its order purporting to allow an appeal in respect of a transport service operating in the

1. (1943) 2 M.L.J. 254 : L.R. 70 I.A. 129 : I.L.R. 1944 Mad. 457 (P.C.).
2. (1948) 1 M.L.J. 322.
3. (1948) 1 M.L.J. 401.

moffusil. The High Court had no difficulty in holding that though the respondent Board had its offices in the Presidency Town, the subject-matter was entirely outside the original jurisdiction of the High Court and as such the decision in the *Parlakimedi case*[1] directly precluded it from issuing the writ asked for. That an act of the Government or a public officer which is not judicial but administrative cannot be quashed by a writ of *certiorari* was held in *Shiva Rao* v. *The Collector of Madras*[2]. The principles on which a Court interferes by issuing a writ of *certiorari* to quash were discussed and laid down in *Krishnaswami Ayyar* v. *Mohanlal Binjani*[3] and the Court held that errors apparent on the face of the proceedings are always treated as errors of jurisdiction for the purpose of quashing by issue of a writ of *certiorari*. In *Amirthalingam Pillai*, In re[4], the High Court had occasion to decide that it has no jurisdiction to grant leave to appeal to the Privy Council against its judgment in criminal appeals arising out of the judgments of moffussil Courts. *Thiruvengada Mudaliar*, In re[5], is an important decision on the scope of the jurisdiction of the High Court under clause 17 of the Letters Patent. It was held in that case that in the exercise of its inherent jurisdiction vested in it under the Letters Patent, the High Court has power to appoint a guardian in respect of the person and property of minors covering even their undivided interest. In the case under review the father and manager of a Hindu joint family applied under clause 17 of the Letters Patent for being appointed guardian of the ancestral joint family property belonging to the minor sons and for sanction of the sale of that property as being beneficial to the interest of the minors and it was held that the High Court would be justified in granting the prayer both by virtue of the power conferred by clause 17 of the Letters Patent and the practice in our High Court.

THE BAR: ITS PRIVILEGES, RIGHTS AND DUTIES.—A Full Bench had to consider in *A Pleader* in the matter of[6], the propriety of the conduct of a pleader giving evidence in a case for a party for whom he was appearing without cancelling the vakalat. It was held that such conduct was improper and in no circumstances could it be considered that it was anything other than deserving of condemnation. Their Lordships thought that as there was no authority or rule which prohibited such conduct there was a doubt whether it could be said to be professional misconduct within the purview of section 13 (*b*) of the Legal Practitioners' Act and that the doubt should be exercised in favour of the pleader. At the same time they pointed out the necessity for the Madras Bar Council to frame rules in regard to such matters. In *Gopala Menon*, In re[7] it was held that while there could be no objection to having the name of an advocate changed in the certificate and in the roll of advocates, the High Court could not grant such a prayer in so far as it related to the enrolment papers filed with the Bar Council. It was cautioned that the change where it suggests that he belongs to a caste other than that which is indicated by his original name, should not be understood as deciding that he is entitled to describe himself as belonging to any particular caste. In the matter of the fee payable to a junior under rule 33 of the Legal Practitioners Fees Rules, the High Court felt in *Basavayya* v. *Raghavayya*[8], that it could not give effect to the spirit of the rule overlooking its clear language in a case where the junior died after the framing of the issues and another junior was substituted in his place. The result was that no junior fee was allowable in such a case. Their Lordships held that it was a matter for the Rule Committee to make suitable amendments to the rule to cover such cases.

CONSTITUTIONAL LAW.—The competency of the Indian Legislature in regard to extra-territorial legislation was raised before the Privy Council in *Wallace Brothers and Co., Ltd.* v. *Commissioner of Income-tax, Bombay*[9], with reference to section 4 (1) (*b*) (*ii*) and section 4-A (*c*) of the Indian Income-tax Act. Before proceeding

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1. (1943) 2 M.L.J. 254 : L.R. 70 I.A. 129 : I.L.R. 1944 Mad. 457 (P.C.).
2. (1948) 1 M.L.J. 266.
3. (1948) 2 M.L.J. 559.
4. (1948) 2 M.L.J. 416.
5. (1948) 2 M.L.J. 47.
6. (1948) 1 M.L.J. 170.
7. (1948) 1 M.L.J. 361.
8. (1948) 1 M.L.J. 344.
9. (1948) 2 M.L.J. 62 (P.C.).

to the decision of the case their Lordships stated the principle in regard to such matters thus : " There is no rule of law that the territorial limits of a subordinate Legislature define the possible scope of its legislative enactments or mark the field open to its vision. The ambit of the powers possessed by a subordinate Legislature depends upon the proper construction of the statute conferring these powers . . . . The enabling statute has to be read against the background that only a defined territory has been committed to the charge of the Legislature ". Then section 99 (1) read with section 100 of the Government of India Act was considered and it was said that it did not help one way or another in determining the authorised area of taxes on income. Then they decided that the validity of the legislation, *i.e.*, section 4 (1) (*b*) (ii) and section 4-A (*c*) of the Indian Income-tax Act depends on the sufficiency for the purpose for which it is used of the territorial connection set forth in the impugned portion of the statutory test and confined themselves to that only and did not lay down any general formula defining what territorial connection is necessary. As they found the company at home in British India, they held it was a person properly subject to the jurisdiction of the Central Indian Legislature and that hence the impugned legislation was not *ultra vires* the Indian Legislature. *Ramgarh State* v. *Province of Bihar*[1] is the first decision of the Federal Court in regard to the scope and limits of its original jurisdiction. According to that decision the Federal Court is not a Court of original civil jurisdiction in all matters and between all parties and that its jurisdiction is derived from and is limited by section 204 of the Government of India Act, 1935, as adapted by the India (Provisional Constitution) Adaptation Order, 1947, which imposes limitations on the exercise of its original jurisdiction both as regards parties and the subject-matter. It was pointed out that apart from the relief claimed, unless a plaintiff comes within one or the other of the classes of parties mentioned therein *i.e.*, the Dominion, the Provinces and the Acceding States, the Federal Court would have no jurisdiction to entertain his suit under section 204. An argument that " a state " in the proviso to section 204 includes a non-Acceding State so as to enlarge the scope of the jurisdiction of the Court was rejected as also a suggestion that the Federal Court would be competent to entertain a suit when there is no other Court in the land to decide questions of the kind raised by the plaint in a suit. In *Kuppuswami Rao* v. *The King*[2], the Federal Court had to decide the question whether it was precluded from deciding as to the competency of an appeal by the granting of a certificate by the High Court under section 205 of the Government of India Act and as to the meaning of the words " judgment " and " final order." Their Lordships of the Federal Court say that though they will not question that a dispute on the interpretation of the Government of India Act had arisen in the matter when once a certificate had been granted under section 205 (1) of the Act, the certificate would not preclude them from considering the point whether the appeal is really from a judgment, decree or final order of the High Court. The question before the Federal Court was whether an order passed in revision against an interlocutory order made on a preliminary objection as to the maintainability of a prosecution in the absence of the consent of the Governor of the Province under section 270 (1) was a "judgment" or a "final order". According to the decision of the Federal Court as the words " judgment or final order " are used in section 205 (1) and impart jurisdiction to the Federal Court to entertain appeals both in Civil and Criminal matters, it would not be proper to construe them in a certain way when applicable to appeals in civil matters and give them a wider meaning when considered in connection with appeals from criminal proceedings. After pointing out that the word " judgment " means with reference to a civil case, the determination of the rights of parties in the matter brought before the Court, and that it is used in the Criminal Procedure Code to indicate the termination of the case by an order of conviction or acquittal of the accused, it was decided that it cannot cover a preliminary or interlocutory order in a criminal case. In the result their Lordships held that the order before them was neither a " judgment " nor a " final order " and

1. (1948) 2 M.L.J. 44.
2. (1948) 1 M.L.J. 103 (F.C.).

that hence the appeal to the Federal Court against such an order was not maintainable. It would be convenient to notice at this stage the decision in *Sriramamurthy Naidu* v. *Satyanarayana Naidu*[1]. There a suit for partition was held to be not maintainable by the trial but the High Court on appeal held it to be maintainable and remanded the suit for disposal after the trial Court had given findings on the issues on which evidence had been let in. On the question whether such an order could be the subject-matter of an appeal to Federal Court, it was held that the order passed by the High Court was not a final order as the matters in dispute between the parties had not been finally decided and that hence leave to appeal against such an order could not be granted. The decisions in *Sivasankara Thevar*, In re[2] and *Venkataraman*, In re[3], are two cases in which the question of the competency of an appeal to the Federal Court against orders passed on applications under section 491, Criminal Procedure Code, was canvassed. The basis of the two decisions was that orders passed by the High Court in applications under section 491, Criminal Procedure Code, are in the exercise of the criminal jurisdiction of the Court and as such no appeal would lie to the Federal Court under the provisions of the Federal Court (Enlargement of Jurisdiction) Act of 1948. It was also pointed out in *Venkataraman*, In re[3], that where no question of interpretation of the Constitution Act is involved in the disposal of the case under section 491, Criminal Procedure Code, no right of appeal can arise under section 205 of the Government of India Act. The decision in *Veeraswami* v. *Provincial Government of Madras*[4], held that in the absence of a statutory right such as is indicated in section 240 of the Government of India Act, a Government servant would have no right, if the Government wished to dispense with his services, other than reasonable notice and that a public servant whose conduct is enquired into has no common law or statutory right to appear by counsel. Where the proposed action against a Government servant is dismissal or reduction in rank, the attention of such servant must, according to the decision, be prominently drawn to the punishment which might be meted out to him at the time when the proposed action is about to be taken. After this decision was rendered by our High Court the Privy Council had to consider in *High Commissioner for India* v. *I. M. Lal*[5] the nature of the provisions of section 240 of the Government of India Act. The two decisions of the Board in *Rangachary* v. *Secretary of State for India*[6] and *R. Venkata Rao* v. *Secretary of State for India*[7] were contrasted and their Lordships of the Privy Council held in agreement with both the High Court and the Federal Court that the provisions of sub-section (3) of section 240 are prohibitory in form which is inconsistent with their being permissive and that they are mandatory and necessarily qualifies the right of the Crown recognised by sub-section (1) and provide a condition precedent to His Majesty's exercise of his power of dismissal provided by that sub-section. They also held that no action is proposed within the meaning of sub-section (3) of section 240 until a definite conclusion has been come to on the charges against a Government servant, and the actual punishment to follow is determined upon and that it is on that stage being reached that the statute gives the civil servant the opportunity for which sub-section (3) makes provision. On the question of the right of a servant of the I. C. S. to recover arrears of pay by action in a civil Court their Lordships had no difficulty in holding relying on the decision of *Mulvenna* v. *The Admiralty*[8] that he had no statutory right to recover it by suit and that there was no covenant under which the particular civil servant is given a right to his pay. The test for determining the necessity of the consent of the Governor-General under section 270 of the Government of India Act was laid down by the Judicial Committee in *Gill* v. *King-Emperor*[9]. They held that a public servant can only be said to act or purport to act in the discharge of his official duty, if his act is such as to lie within the scope

1. (1948) 2 M.L.J. 511.
2. (1948) 2 M.L.J. 76.
3. (1948) 2 M.L.J. 513.
4. (1948) 1 M.L.J. 6.
5. (1948) 2 M.L.J. 55 (P.C.).
6. (1937) 1 M.L.J. 515 : L.R. 64 I.A. 101 : I.L.R. 1937 Mad. 517 (P.C.).
7. (1939) 1 M.L.J. 529 : L.R. 64 I.A. 55 : I.L.R. 1937 Mad. 532 (P.C.).
8. (1926) S.C. 842.
9. (1948) 2 M.L.J. 6 (P.C.).

of his official duty and that the test as to the necessity for consent is whether the public servant, if challenged, can reasonably claim that, what he does he does in virtue of his office. The fact that the opportunity to do the act arose on account of his official position occupied by the public servant was held in *Doraiswami Iyer*, In re[1] would not matter or affect the question of the necessity for consent under section 270 of the Government of India Act or sanction under section 197, Criminal Procedure Code. In *Albert West Meads* v. *The King*[2], it was held that the proceedings before a Court-Martial are not "proceedings civil or criminal" in the sense in which those words are used in section 270 (1) of the Government of India Act and that they indicate only the civil or criminal proceedings capable of being instituted under the ordinary law of the land and do not include proceedings under the military law. Another point that was decided in that case was that the acts of a public servant of fraudulently misapplying money entrusted to his care as a public servant could not be said to be acts done by him by virtue of his office that he held and that hence sanction under section 270 (1) was not necessary for his prosecution for the offences committed by him. It remains to be seen whether even after these pronouncements the same question would not be re-agitated.

Criminal Law.—In *Crown Prosecutor* v. *R. K. Pillai*[3], it was held that the establishment of a connection between the performance of the official duty and the demand or payment of gratification was necessary before it could be said that the gratification offered was a motive or reward for any of the purposes mentioned in section 161, Indian Penal Code. Where, in a capital case, irreconcilable or totally contradictory statements are made by witnesses of the crime at different stages of time and the only explanation offered is that at one stage they were threatened by the prisoners and at another stage by the police, it was held in *Bijjili Papamma*, In re[4], that the witnesses in such case should be proceeded against under section 193, Indian Penal Code read with section 476, Criminal Procedure Code. In *Madiga Narasigadu*, In re[5], it was held that it would not be in the interests of justice that certain illiterate witnesses should be proceeded against under section 193, Indian Penal Code, simply because the statements which they made under section 164, Criminal Procedure Code, were subsequently denied in the preliminary enquiry and which is explained as being due to police coercion. Where an act was done with an intention to commit an offence under section 201, Indian Penal Code, but in fact there was no disappearance of any evidence of the commission of an offence, it was held in *Parasa Mangadu*, In re[6], that the offence committed was only an attempt to cause the disappearance of the evidence of the offence and the accused could not be convicted of an offence under section 201, Indian Penal Code read with section 149, Indian Penal Code, but only under section 201 read with section 511, Indian Penal Code. In *Sivaprakasam Pillai*, In re[7], it was held that where the alleged offence consisted in posting a letter containing a false charge against an official to the Inspector-General of Police, Madras, the offence could be said to be completed only, when the letter reached the destination, *i.e.*, the Inspector-General's Office, Madras. There is no attempt to commit the offence by posting the letter. Where a head constable attempted to arrest a person on suspicion without the necessary warrant in writing required by section 56 (1) of the Criminal Procedure Code, the use of Criminal force by the person suspected against the head constable was held in *Muni Reddi*, In re[8], would not amount to an offence under section 353, Indian Penal Code. In *Ganeshmal Sait*, In re[9], the chief element of the offence under section 384, Indian Penal Code, is stated to be that of intentionally putting a person in fear of an injury to that person or to any other and thereby *dishonestly* inducing the person so put in fear to deliver to any person any property or valuable security. The person putting that individual in fear of

1. (1948) 2 M.L.J. 116.
2. (1948) 2 M.L.J. 120 (P.C.).
3. (1948) 1 M.L.J. 142.
4. (1948) 1 M.L.J. 116.
5. (1948) 2 M.L.J. 558.
6. (1948) 2 M.L.J. 375.
7. (1948) 1 M.L.J. 21.
8. (1948) 1 M.L.J. 377.
9. (1948) 1 M.L.J. 412.

injury must have the intention that wrongful loss should be caused. In *Vaiyapuri Goundan* v. *Kuppuswami Goundan*[1], it is laid down that in order to constitute an offence under section 427, Indian Penal Code, there should be an intention to cause " wrongful loss " as defined in section 28 of the Indian Penal Code, *i.e.*, loss by unlawful means of property to which the person losing it is legally entitled. As the complainant in the case was not legally entitled either to the land or to the crops standing on it, its destruction by the cattle of the accused was held not to amount to an offence under section 427, Indian Penal Code. It was held in *Anthony Udayar* v. *Velusami Thevar*[2], that to secure the protection of the ninth exception to section 499, Indian Penal Code, it was necessary that the imputation should have been made in good faith and for the protection of the interest of the person making it or of any other person or for the public good. As to what would amount to good faith, it was said that good faith is relative to a great extent and must be determined by the circumstances under which the imputation is made, the social status and level of education of persons making the imputation and their reasoning capacity. In *Gopalan*, In re[3], the ingredients of an offence under section 503, Indian Penal Code, were considered and it was held that the section would be inapplicable unless the speech alleged to constitute criminal intimidation threatens injury to the person, reputation or property of an individual or group of individuals and that it is the intention of the speaker that has to be considered in deciding as to whether what he stated comes within the mischief of section 503. The speaker need not know that the persons intended to be frightened were present when he made the speech. A threat of social boycott was held would not amount to an offence under section 506, Indian Penal Code, in *Selathu*, In re[4]. It was also held that the enforcement of social boycott would not amount to an injury within the meaning of section 44, Indian Penal Code.

EVIDENCE.—In *Gill* v. *King-Emperor*[5], their Lordships of the Judicial Committee have considered the circumstances under which evidence as to conspiracy would be admissible under section 10 of the Evidence Act. They also held that just as a trial Judge may admit evidence under section 10, when he has such a reasonable ground of belief as is postulated, yet must reject it if at a later stage of the trial that reasonable ground of belief is displaced by further evidence, so the appellate Court, which has refused that belief, must refuse also to admit evidence which was admissible only upon the footing of the belief being entertained. It was further pointed out that it is not the correct view that in a conspiracy charge, evidence once admitted remains admissible evidence whatever new aspect the case may bear whether in the original or appellate Court. In *Ramaswami Goundan* v. *Subbaraya Goundan*[6], it was held that a previous judgment though not *inter partes* would be admissible under section 35 of the Evidence Act to prove a statement made by a predecessor-in-title of the party against whom the document is sought to be used, and an admission contained in such judgment as to the date of the death of the father of the predecessor-in-title would be admissible to prove the date of death of such person. In the same case the limits of the rule as to the presumption of genuineness of old documents were considered. It was held that section 90 of the Evidence Act only states that Courts may draw the presumption referred to in the section and not that it must draw the presumption. It was pointed out that in many cases it would be most dangerous to draw the presumption that a document was genuine merely because it was thirty years old according to the recitals in it and came from proper custody. It was suggested that the Court may mark the document as an exhibit without requiring formal proof and then consider having regard to the evidence and surrounding circumstances whether it was or was not genuine. In *Soma Reddi* v. *Tippa Reddi*[7], it was held that where in a suit on a promissory note it is pleaded in defence that it was only a voucher of prior borrowing to which sections 8 and 9 of the Madras

1. (1948) 1 M.L.J. 330.
2. (1948) 1 M.L.J. 420.
3. (1948) 2 M.L.J. 383.
4. (1948) 2 M.L.J. 522.
5. (1948) 2 M.L.J. 6 : L.R. 75 I.A. 41 (P.C.).
6. (1948) 1 M.L.J. 215.
7. (1948) 2 M.L.J. 282.

Agriculturists' Relief Act would apply and that it was executed owing to a fraudulent misrepresentation of the plaintiff, oral evidence to substantiate the plea would be admissible.

TORT.—On a question whether a tom tom made in the following words; "S. B.'s goods (plaintiff's) are being sold by public auction at 3 P.M. on 27th October, 1944," constituted a slander of the plaintiff, it was held in *Sukraji Bikaji* v. *Kundanmal Packraj*[1] that the mere statement that the goods were being sold by public auction without the addition that they were sold in pursuance of a decree or through the Official Receiver did not by itself suggest the innuendo that the plaintiff was not solvent and that his goods were being brought to sale by auction by the creditor.

HINDU LAW.—Their Lordships of the Judicial Committee have in *Lala Lachmandas* v. *Commissioner of Income-tax, Punjab*[2], laid down the rights of an individual coparcener of a Hindu joint family. They say that while remaining joint he can possess, enjoy and utilise, in any way he likes, property which was his individual property, not acquired with the aid of or with any detriment to the joint family property. He can, according to the Lordships enter into contractual relations with others including his family, so long as it is represented in such transaction by a definite personality like its manager and that in such a case he retains his share and interests in the property of the family, while he simultaneously enjoys the benefit of his separate property and the fruits of its investment. To be able to do this, it was pointed out, it is not necessary for him to separate himself from his family. The actual decision in the case was that there could be a valid partnership between the Karta of a Hindu joint family representing it on the one hand and a member of that family in his individual capacity on the other. *Krishnamoorthy Iyer* v. *Nataraja Iyer*[3] considered the degree of prudence expected of a manager of a Hindu joint family with reference to an alienation by him of family property. It was held that in working out the equity in favour of the alienee of an item of family property, it was open to the Court to allot the alienated item to the share of the alienating coparcener, where that could be done without prejudice to the rights of other coparceners and that this could be worked out in a suit by the coparcener for partition without the alienee being compelled to file a separate suit for partition. In *Subbiah* v. *Venkateswarlu*[4], it was held that when the same property is alienated by different members of the family to different persons, the rights of the alienee from the one is not stronger than the position of the alienee from the other and that if at all there is any difference, equity favours the first alienee. The rights of the second alienee is only to sue for a general partition and ask that the alienated item be allotted to the share of his alienor. In *Durga Prasad* v. *Ghanshiam Das*[5], the Privy Council held that where it is established that an old family firm was joint and that the branch firms started with a nucleus of family property were also joint, it is the task of a member alleging a separation to prove it. As a determining factor of the whole case the question of onus would only arise if the Court finds the evidence so evenly balanced that it can come to no definite conclusion. In *Muthuswami Thevar* v. *Chidambara Thevar*[6], it was ruled by the Privy Council that under Hindu Law the only persons who can give a son in adoption are the father and the mother and that in the life time of the father, the mother cannot act without his permission. On the question of the validity of an adoption of a married man among Sudras in the Madras Presidency, their Lordships held that according to the Dattaka Chandrika, which is regarded as authoritative in the Province of Madras "marriage concludes the period within which a Sudra may be adopted." In *Narasimhalu* v. *Someswara Rao*[7], the true nature of a partition arrangement is explained and it was held that the allotment of a *jyestabagam* to the eldest member was no more than giving a larger share than would be strictly

1. (1948) 2 M.L.J. 270.
2. (1948) 1 M.L.J. 201 (P.C.).
3. (1948) 1 M.L.J. 430.
4. (1948) 1 M.L.J. 478.
5. (1948) 2 M.L.J. 226 (P.C.).
6. (1948) 2 M.L.J. 468 (P.C.).
7. (1948) 1 M.L.J. 150.

due to him and involved no gift by the younger brother or brothers with the result that the eldest brother would hold it as ancestral property in which his sons are entitled to a share. It was also held in the same case that a daughter born during the pendency of a suit for partition could have no legal claim against the plaintiff's share of the family property for her marriage expenses. The proper mode of providing for the marriage expenses of a daughter in a partition decree was also indicated. In *Radha Krishna* v. *Satyanarayana*[1], it was held that when once a disruption or division of the status of the family takes place as the result of an unilateral declaration of intention of a member to divide which has been communicated to the others it is not open to that member thereafter to nullify its effect so as to restore the family to its original joint status. Such a withdrawal cannot amount to an agreement to reunite. In *Kaliammal* v. *Sundarammal*[2], it was held that after partition the presumption would be against reunion and that though reunion could be proved by subsequent conduct of the parties, to establish it, it was necessary to show not only that the parties already divided lived together, but that they did so with the intention of thereby altering their status and forming a joint estate with all its usual incidents. Another point decided in the same case was that a compromise by a widow by which the entire right of the reversion is surrendered without any corresponding benefit to the estate cannot be binding on the reversioners as it is neither reasonable nor prudent. A suit for partial partition and possession was held in *Subbarayudu* v. *Ramanaiah*[3], to be maintainable as between strangers who have taken on lease different parcels of family property from different coparceners in the joint family. In *Gopala Krishna Chetty* v. *Dorai Babu*[4], it was pointed that before an illegitimate son of a Sudra can establish a claim to a share in the properties of his putative father it must be shown that the son was born of a union neither adulterous nor incestuous, but that if the claim was only for maintenance such proof was not necessary. It was decided in that case that after the death of a Sudra father, his illegitimate son born of a permanently kept concubine, the union not having been adulterous or incestuous, was not entitled to a share in the properties of the family of which his father was an undivided (*avibakta*) coparcener when he died. The nature and extent of the right of a step-mother to maintenance was considered in *Audemma* v. *Varada Reddy*[5], in the light of an exhaustive discussion of the relevant case law. In regard to the right of a widowed daughter-in-law to maintenance, it was held in *Appavu Udayan* v. *Nallammal*[6], that a widowed daughter-in-law has a moral but not a legal right to maintenance from her father-in-law out of his self-acquired property and that on the death of the father-in-law, if his self-acquired property decended by inheritance to his heirs, the moral liability of the father-in-law ripened into a legal liability of his heirs enforceable against them by the daughter-in-law to the extent of their inheritance; in either case existence of indigence is not an essential factor to be proved to establish liability.

MAHOMEDAN LAW.—In *Saiyed Mazhar Husain* v. *Adiya Saran Singh*[7], their Lordships of the Judicial Committee laid down the circumstances which would satisfy the requirements of the Shia Law necessary to the valid creation of a wakf when there is no evidence as to the execution of a wakfnama or any oral dedication. In *Nawazish Ali Khan* v. *Ali Raza Khan*[8], the Privy Council has decided that powers of appointment are not recognized in Muslim Law and that to add to the testamentary capacity of Muslims the right to create powers of appointment might seem to encroach on the sphere of the Legislature. The bequest in that case was to three successive tenants for life and then to the successor appointed under the power conferred by the will and it was held that the power of appointment was invalid as opposed to Muslim Law. They further held that Muslim Law admits only ownership unlimited in duration but recognizes

1. (1948) 2 M.L.J. 331.
2. (1948) 1 M.L.J. 366.
3. (1948) 2 M.L.J. 181.
4. (1948) 2 M.L.J. 221.
5. (1948) 1 M.L.J. 30.
6. (1948) 1 M.L.J. 110.
7. (1948) 1 M.L.J. 259 (P.C.).
8. (1948) 2 M.L.J. 303 (P.C.).

interests of limited duration in the use of property and that there was no difference between the several schools of Muslim Law in their fundamental conception of property and ownership.

INSOLVENCY LAW.—The question as to the extent of the applicability of the law laid down in *Cohen* v. *Mitchell*[1], in regard to the question of the vesting in the Official Assignee of the after-acquired property of an undischarged insolvent in a case arising under the Presidency Towns Insolvency Act was elaborately discussed in *Abdul Rahim* v. *The Official Assignee of Madras*[2]. Their Lordships after tracing the growth of the judge-made law in England came to the conclusion that the distinction between real and personal property made in England in applying the rule of postponement of vesting of after-acquired property till the intervention of the trustee could not be properly applied in India and that there was no difference in India between moveable and immoveable property of the insolvent for the purpose of vesting in the Official Assignee. On an examination of the provisions of the Presidency Towns Insolvency Act it was held that the moment a property is acquired by or devolves on an undischarged insolvent, such property becomes *eo instanti* vested in the Official Assignee or Receiver and that there is no distinction in this respect between property belonging to and vested in the insolvent at the commencement of the insolvency and property which may be acquired by or devolve on him subsequent to the adjudication and before discharge. The transfer by the undischarged insolvent of his after-acquired property was held to be void as against the Official Assignee. The desirability of the Legislature intervening and abolishing the anomalies and differences between the law of insolvency applying to Presidency Towns and that applying to the moffusil was pointed out at the close of the judgment. A matter of procedural importance was decided in *Visvanathan Chettiar*, In re[3], (*i.e.*) that the issue of summons under section 36 of the Presidency Towns Insolvency Act to persons capable of giving evidence of the insolvent's dealing with his property is governed by Order 16 of the Civil Procedure Code. The decision in *Abdul Shukoor Sait* v. *The Official Assignee of Madras*[4] holds that section 7 of the Presidency Towns Insolvency Act would not apply to matters totally unrelated to the administration of the estate of the insolvent and distribution of his assets among the creditors. These would not relate to disputes arising between third parties simply because the disputes are in a remote way connected with insolvency proceedings. Where the Official Assignee wants to obtain the directions of the Court in such unrelated matters, the application would more appropriately fall under section 85 (3) of the Act. The question of interest to be allowed on deposits made with an insolvent by his relatives where the amounts were carried forward from year to year with interest calculated at 12 per cent. per annum was considered in *Annapurnamma* v. *The Official Assignee, Madras*[5]. The Official Assignee allowed only 6 per cent. interest on the amounts originally deposited from the date of deposit to the date of adjudication, basing his decision on clause 23 (2) of the Second Schedule, Presidency Towns Insolvency Act. But the Court held relying on *Paton* v. *Inland Revenue Commissioners*[6], that the debts provable in the case were not the original debts but the capital sums consisting of a number of debts inclusive of interest which was calculated at the end of each year at 12 per cent. and carried forward from year to year and that for the purpose of the dividend it is the capitalised amount shown to the credit of the depositors in the last account that should be taken as the proper amount. On a question as to a right of appeal under the Provincial Insolvency Act, it was held in *Pedda Iswara Reddi*, In re[7], that section 5 of that Act cannot override the provisions of section 75 of the same Act in so far as the latter section confers a right of appeal in any instance. In *The Official Receiver of Ramnad* v. *Devarayan Chettiar*[8], section 28-A introduced by Act XXV of 1948 was held to be retrospective and that after the amendment the father's disposing power over his sons' shares vested in the Official

1. (1890) 25 Q.B.D. 262.
2. (1948) 2 M.L.J. 656.
3. (1948) 1 M.L.J. 241.
4. (1948) 2 M.L.J. 274.
5. (1948) 2 M.L.J. 465.
6. (1938) A.C. 341.
7. (1948) 1 M.L.J. 310.
8. (1948) 2 M.L.J. 415.

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Receiver after the adjudication. As in that case the sons had instituted a suit for partition against their father after adjudication, it was held that the Official Receiver had no right to act on behalf of the sons after that suit. The powers of the Official Receiver on an annulment of the adjudication in respect of properties vested in him under section 37 of the Provincial Insolvency Act were considered in *Official Receiver, East Godavari* v. *Tadi Murali Mohan Reddi*[1], and it was held that his powers in respect of such properties need not be expressly conferred by the order under section 37 and they may be such as are necessarily implied by the vesting order and that the receiver will have in respect of such properties the powers he had in respect of the insolvent's properties generally before the date of the annulment. The Official Receiver was held entitled to maintain a suit to enforce a claim for contribution possessed by the insolvent. The effect of an annulment of the adjudication was held in *Sakhamuri Perayya* v. *Nimmaraju Kondayya*[2], to relate back to the date of the adjudication and is as if no adjudication had taken place except as regards the acts of the Court and the Official Receiver which are validated by section 37 of the Provincial Insolvency Act. It was held that as there was no statutory prohibition against the sale of property by the insolvent after initiation of insolvency proceedings, such a transaction would be binding as between the parties thereto. In *Thimmappa* v. *Balayya*[3], a rather curious case, certain alienations made by the insolvent were set aside and subsequently the adjudication was annulled but the property was ordered to continue to vest in the Official Receiver and thereafter the alienees deposited sums enough to pay off all the creditors and asked that they might be given possession of the property. The insolvent also deposited enough to pay the creditors and the alienees and asked that he might be given possession of the properties. In deciding in favour of the alienees the Court remarked that an insolvency Court administers the assets of the insolvent in equity for the benefit of the creditors and restores it to the person to whom it is properly due, if the claims of the creditors do not necessitate the sale of the property. That a mortgagee from an insolvent could under certain circumstances appeal against the order of adjudication as a " person aggrieved " within the meaning of section 75 of the Provincial Insolvency Act was held in *Official Trustee of Madras* v. *Sethu Chettiar*[4]. Orders allowing certain alienees from an insolvent to be added as party respondents in the insolvency proceedings were held in *Pedda Iswara Reddy, In re*[5], to be orders made or decisions come to in the exercise of insolvency jurisdiction within the meaning of section 75 of the Act and as such appealable. In *Eacharan Nair* v. *Chinnayya Rowther*[6], where a mortgagee from an insolvent who had not proved his debt in insolvency sued for a money decree after the annulment of the adjudication, it was held that he can rely on section 78 (2) of the Provincial Insolvency Act and exclude the period between the date of the order of adjudication and the date of the order of annulment in computing the period of limitation for his suit.

PROPERTY LAW.—The assignment of the right of a principal to recover moneys due from an agent on the revocation of his power of attorney was held in *Sheik Mohammed Maracair* v. *Bathummal Beevi*[7], not to be an assignment of a mere right to sue. In *Catholic Mission Presentation Convent* v. *Subbanna Goundan*[8], the conditions necessary for a transferee invoking the protection of section 41 of the Transfer of Property Act to establish are laid down. It was pointed out that the consent of the real owner referred to in the section must be to the transferor holding the property as ostensible owner and not also to the transfer sought to be protected under the section. The real owner must be shown in some manner to have been privy to the creation of the ostensible ownership. The object and applicability of section 52 of the Transfer of Property Act was considered by the Privy Council in *Gouri Dutt Maharaj* v. *Sheikh Sukur Mohammed*[9]. It was said that the broad purpose of

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1. (1948) 1 M.L.J. 473.
2. (1948) 1 M.L.J. 290.
3. (1948) 2 M.L.J. 590.
4. (1948) 2 M.L.J. 194.
5. (1948) 1 M.L.J. 310
6. (1948) 2 M.L.J. 256.
7. (1948) 1 M.L.J. 298.
8. (1948) 1 M.L.J. 11.
9. (1948) 2 M.L.J. 79 (P.C.).

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section 52 was to maintain the *status quo* unaffected by the act of any party to the litigation pending its determination and that the applicability of the section cannot depend on matters of proof or the strength or weakness of the case on one side or the other in *bona fide* proceedings. Though the section may not contemplate a decree or order which is entirely alien to the issues raised between the parties, it was held that it applies to a compromise decree. In *Rattayya* v. *Chandrayya*[1], it was pointed out that section 53-A of the Transfer of Property Act requires that the contract relied on must be signed by the person claiming to recover possession or on his behalf presumably by some one. Applying this it was held that when the sons impugn an unregistered sale signed by the father, the vendees in possession under such a sale cannot rely on the doctrine of part performace. The Privy Council in *Subrahmanyam* v. *Subba Rao*[2], held that the words " transferor " in section 53-A refer back to the person who " contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf." In the case of a contract of sale of the immoveable properties of a minor by his mother and guardian to discharge his father's debts, as the act is on behalf of the minor, the latter was held to be the person who most aptly answered to the description of "the transferor" in section 53-A with the result that he would be debarred from enforcing against the transferee any right in respect of the property in his possession other than a right expressly provided by the terms of the contract of sale. In *The Official Receiver, East Godavari* v. *Tadi Murali Mohan Reddi*[3] it was held that a "contract to the contrary" within the meaning of section 82 of the Transfer of Property Act is a contract between a mortgagor and a mortgagee. A mortgage by two mortgagors of their properties under which the properties of the first mortgagor were to be liable in the first instance and the other properties were tc be liable only in the event of the security of the properties liable in the first instance being insufficient was held to be a " contract to the contrary " within the meaning of section 82. In considering the some point it was held in *Satyanarayanamurthy* v. *The Official Receiver, East Godavari*[4], that an indemnity clause contained in a sale deed in favour of a vendee of some of the properties charged for the payment of maintenance by a decree against the vendor would not amount to a " contract to the contrary ". within the meaning of the section. That a charge under section 45 of the Madras District Municipalities Act for property tax is one created by operation of law and falls within section 100 of the Transfer of Property Act was held in *A.M.A. Firm* v. *Marudachalam Chettiar*[5]. It was further held that a sale in pursuance of such a charge had not the effect of annulling the prior encumbrances and the mortgagee purchasers in execution of a decree on an earlier mortgage who had not been inpleaded in the suit by the Municipality were not barred from proceeding with a suit to enforce the right of redemption under section 91 of the Transfer of Property Act against the purchasers of the property in the sale in execution of the charge decree. In *Venugopala Pillai* v. *Thirunavukkarasu*[6], a lease of the toddy yield of a coconut garden was held to be a lease for agricultural purposes and that therefore a sufficiently reasonable notice was necessary before it could be terminated and that the principle underlying section 106 of the Transfer of Property Act would be applicable to such a case. In *K. K. Kunhothi* v. *P. Mohamed Koya*[7], it was held that the right of redemption provided by section 60, Transfer of Property Act, is available to a jenmi or a person claiming through him even as regards kanom documents and that there was nothing in the Malabar Compensation for Tenants' Improvements Act to take away that right.

Madras Estates Land Act.—Where two parcels of land comprised in an inam village were treated even before the settlement as separate grants and at the time of the settlement the lands were confirmed under two title deeds, it was held in *Mangamma* v. *Appudu*[8], that the lands did not

1. (1948) 1 M.L.J. 392.
2. (1948) 2 M.L.J. 22 (P.C.).
3. (1948) 1 M.L.J. 473.
4. (1948) 2 M.L.J. 426.
5. (1948) 1 M.L.J. 284.
6. (1948) 2 M.L.J. 155.
7. (1948) 2 M.L.J. 293.
8. (1948) 1 M.L.J. 247.

form part of an "estate" within the meaning of section 3, 2 (*d*) of the Madras Estates Land Act. In *Suryaprakasa Rao* v. *Maharaja of Pithapuram*[1], it was held by the P.C. that when a person is recognised as a "landholder" under section 3 (5) of the Act, he becomes clothed with full statutory authority to collect the rents and profits and his receipt of them cannot be said to be wrongful. A usufructuary mortgagee of a post-settlement inam was held in *Seetharama Raju* v. *Satyanarayanamurthi*[2], to be "landholder" within the meaning of the Act. In *Ramamurthi* v. *Venkayya*[3], it was held that where a grant was of 8 acres for services rendered, with the grantee having powers of alienation and hereditary enjoyment and a small Kattupadi was fixed and the proprietors had at no time any right to land, the grantee was a "landholder" within the meaning of the Act. It was held in *Madura Sri Meenakshi Devasthanams* v. *Sellathayee*[4], that the provisions of section 24 of the Act prohibiting an enhancement of rent do not apply to cases where a right to remission does not continue. It was further held that section 26 (3) of the Act could be applied to a Devasthanam as a trustee is a "landholder" within the meaning of section 3 (5) of the Act and whenever there is a change of the trustee there is technically a change of landholder with the result that a new trustee would have a right to invoke section 26 (3) and to claim that he is not bound by any remission granted by his predecessors. In *Krishnamma Naidu* v. *Venkapathi Naidu*[5], where a landlord brought suits against his tenants under section 77 of the Act claiming rent also for excess arrears said to be in the holding of the tenants it was held that as under clause (3) of section 42 of the Act the agreement should be an express one, in its absence the suits had to be dismissed. But this would not mean that he would be precluded from taking appropriate steps under clauses (1) and (2) of the same section. In *Anaharachariar* v. *Kanakayya*[6], a Bench to whom the case was referred by a single Judge, held that having regard to the general scheme and policy of the Act and, in particular, to the object of section 213 of the Act, a suit by a ryot for recovering sums unlawfully collected from him by the landholder by abuse of the process provided by the Act falls under section 213. The suit whether it be called one for money had and received or one for compensation or one to enforce the obligation declared by section 72 of the Contract Act, is one for damages under section 213 and no Civil Court can take cognizance of such a suit. It was further held that section 136 of the Act does not cover excessive collections of rent.

LAND ACQUISITION ACT.—The decision in *Radhakrishna Chettiar* v. *The Province of Madras*[7], lays down that the proper method of valuation to be adopted in the case of compulsory acquisition relating to a house and ground situated in a Municipality and fetching a regular income is to assess the value on the basis of capitalisation of the net annual income. The number of years' purchase to be adopted for capitalisation has according to the decision to be arrived at by taking into account the interest yielded by Government securities at the time of the notification under section 4 (1) of the Land Acquisition Act. In the case before the Court the annual rental value was capitalised at 33-1/3 years' purchase.

LAW OF CONTRACTS.—In *Parthasarathy Gupta* v. *The Calcutta Glass and Silicate Works, Ltd.*[8], the Court in deciding the question as to the place of suing for damages for breach of a contract held that in order to sustain a suit for damages for breach of contract, a part of the cause of action would arise at the place where performance of the contract is provided and that "performance of the contract" may consist in delivery as well as payment of the price. The Privy Council had to consider in *Raja of Venkatagiri* v. *Raja Rao Sri Krishnayya Rao*[9], whether a promissory note executed for money advanced for defending a litigation in pursuance of an undertaking given by the father of the promisee to the father of the promisor and not volun-

1. (1948) 2 M.L.J. 52 (P.C.).
2. (1948) 2 M.L.J. 259.
3. (1948) 2 M.L.J. 268.
4. (1948) 2 M.L.J. 592.
5. (1948) 1 M.L.J. 359.
6. (1948) 1 M.L.J. 251.
7. (1948) 2 M.L.J. 159.
8. (1948) 2 M.L.J. 101.
9. (1948) 2 M.L.J. 260 (P.C.).

tarily or at the desire of the promisor was supported by consideration and whether the promisee could rely on section 25 (2) of the Contract Act. Their Lordships held that as the moneys were advanced not as the result of the importunity of the promisor but because of the undertaking given by the father of the promisee to the father of the promisor, that will not be "consideration" within the meaning of section 2 (*d*) of the Contract Act to support the promissory note. It was further held that the promisor was not precluded by any provision or principle of law from saying that the consideration stated in the promissory note was past consideration which not having moved at the " desire " of the promisor (*i.e.*) himself, does not fall within section 2 (*d*) of the Contract Act. As regards the applicability of section 25 (2), it was held that the promisee could not rely on it because to invoke its aid it must be shown that there was a promise by the promisor to " compensate " the promisee or his father for something which had been already done by them " voluntarily " for him. In *Venkata Subbayya* v. *Attar Sheik Mastan*[1], one of the parties to an agreement which was inherently illegal and opposed to public policy sought the assistance of the Court to obtain relief under section 65 of the Contract Act. It was held that the parties being in *pari delicto* the Courts could render no assistance in enforcing the agreement. Their Lordships of the Privy Council in *Govindram Seksaria* v. *Edward Radborne*[2], approved of the comment made by Stone, C.J., upon section 65 of the Contract Act that " compensation for an advantage may appear to be a contradiction in terms, since compensation connotes a measure of loss or damage and not the value of an advantage. It should be noted that in section 56 the expression used is " compensation for any loss " and that under section 64 the party rescinding the contract is to restore "any benefit". Under section 65 the alternatives are to restore any advantage "or to make compensation for it to the person from whom he received it." This must mean valuing or quantifying in money the advantage retained, if retained it be." In that case the contract for the sale of machinery " became void " on the outbreak of war after part of the machinery had been delivered and part payments had been made. In considering the claim to recover the balance of the value of the machinery delivered in excess of the price paid, their Lordships laid down the principles which should guide the Courts in deciding such a claim. Where a Railway Company sought to recover from a Municipality the cost of the widening of a culvert situated within its limits, which the company was ordered to do by a requisition by the Provincial Government it was pointed by their Lordships of the Privy Council in *Governor-General in Council* v. *Municipal Council, Madura*[3], that the company could not succeed for the reason, that though the work might have been lawfully done and was not intended to be done gratuitously, it could not, in the circumstances, be said that it was done for the Municipality or that the Municipality enjoys the benefit of it within the meaning of section 70 of the Contract Act. In *Jayaraghavan* v. *The Leo Films*[4], it was remarked that by section 73 of the Contract Act in the absence of proof of damage, nominal damages are not recoverable, and that proof of damage is necessary to enable recoverability. In *Dasappa* v. *Gopala Krishna Co.*[5], the question arose whether a surety for the sum that may be decreed against a judgment-debtor is released from his liability by reason of the judgment-debtor obtaining a stay of execution of the decree passed subsequently against him on his furnishing security. It was held that there was no time given by the decree-holder within the meaning of section 135 of the Contract Act and that as the security given by the judgment-debtor (a portion of which was given up by the decree-holder) came into existence after the suretyship obligation, it could not be postulated that the decree-holder did anything which was inconsistent with his duties to the surety within the meaning of section 139 of the Contract Act. It was pointed out that section 139 must be read with section 141 and not in such a way as to abrogate it when it applies.

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1. (1948) 2 M.L.J. 198.
2. (1948) 2 M.L.J. 1 (P.C.).
3. (1948) 2 M.L.J. 546 (P.C.).
4. (1948) 1 M.L.J. 209.
5. (1948) 2 M.L.J. 312

Company Law.—In *The Coimbatore Transport Ltd.* v. *The Governor-General in Council*[1], it was held that the Governor-General in Council was entitled to apply for and obtain an order for the compulsory winding up of a company where it is unable to pay a very large sum lawfully due and payable by it as and for income-tax. It was further held that the mere existence of a dispute as to the assessments which had not been fully determined would not render an application for compulsory winding up, an abuse of the process of Court. In *Sivagnanammal* v. *Thirumagal Mills Ltd.*[2], it was held that where a company decides to capitalise its profits and issues fully paid-up bonus shares to the shareholders, the sums represented by those shares are in the nature of capital and cannot be treated for any purpose as income and that accordingly a life tenant under a bequest only to the income of the ordinary shares has no right to such bonus shares and so cannot ask for a direction to the company to rectify its register of members, so as to include in it the name of the life tenant as being a member of the Company holding the bonus shares.

Specific Relief.—In *Kandaswamy Chettiar* v. *Shanmugha Thevar*[3], it was held that a clause in an agreement of sale of immoveable property to the effect that in case of default in completing the sale within a specified date the defaulter was to pay a specified sum as damages and that the contract was to become void cannot be availed of by the defaulting party to resist a claim for specific performance of the contract to sell. He cannot take advantage of his own wrong. An averment that the plaintiff had no objection to perform the contract in accordance with the decision of the Court was held in *Arjuna Mudaliar* v. *Lakshmi Ammal*[4], to be a sufficient averment of his readiness and willingness to perform his part of the contract. It was also held in that case that the delay which would preclude a plaintiff from obtaining specific performance must be such that it may be properly inferred that the plaintiff has abandoned his right or on account of the delay there must have been such a change of circumstances that the grant of specific performance would prejudice the defendant. The question whether a co-owner can maintain against another co-owner a suit under section 9 of the Specific Relief Act though discussed in *Molla Madina Saheb* v. *Bhano Bibi Saheba*[5], was not actually decided. In *Ranganathan Chetty* v. *Kanakaratnamma*[6], it was held that section 27-A of the Speicific Relief Act would not help a plaintiff suing for specific performance of an unregistered agreement to lease of a premises for 26 months on a rental of Rs. 85 per month when the plaintiff had never been in possession of the premises at all nor done any act in furtherance of the agreement to lease.

Stamp Law.—In *Yerri Swami* v. *Chinna Vannurappa*[7], it was held that where a promissory note not properly stamped is admitted in evidence tentatively to decide an issue in the first instance, there is no admission of the document within the meaning of section 36 of the Stamp Act so as to preclude the other party from raising the question of the insufficiency of the stamp at a later stage when the whole case is remitted to the lower Court for trial by the appellate Court when it reverses the decision of the trial Court on the issue decided in the first instance.

Court-fees.—In *Subramaniam* v. *Narayanamma*[8], it was held that in a suit relating to agricultural land the income for the " year " before the filing of plaint for purposes of court-fee and jurisdiction is to be computed for the revenue year or the agricultural cultivation year and not the calendar year. Where the adequacy of the Court-fee paid has once been decided by a judicial officer, it was held in *Kadambalithaya* v. *Hebbara*[9], that it could not be re-opened by a succeeding judicial officer and that any error committed by the judicial officer in deciding the question of court-fee could only be corrected under section 12 (2) of the Court-Fees Act.

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1. (1948) 1 M.L.J. 407.
2. (1948) 2 M.L.J. 496.
3. (1948) 2 M.L.J. 356.
4. (1948) 2 M.L.J. 271.
5. (1948) 2 M.L.J. 453.
6. (1948) 2 M.L.J. 189.
7. (1948) 2 M.L.J. 254.
8. (1948) 2 M.L.J. 523.
9. (1948) 2 M.L.J. 553.

In *Polammal* v. *Rathna Mudaliar*[1], it was held that in a suit for specific performance of a contract of sale with alternative prayer for refund of advance paid and for damages separate court-fee for the alternative reliefs was not necessary. Where a suit was for a declaration that a plot was trust property and that its alienation was void and for a consequent injunction to restrain the alienees from interfering with the rightful possession of the plaintiff, it was held in *Thirupathaiah* v. *Mangapathi Rao*[2], that the proper court-fee to be paid would be for two separate declarations with one consequential relief by way of injunction. It was further held that the plot though trust property had a market value. In *Vaiyapuri Vathiar* v. *Soumianarayana Iyengar*[3], it was held that in a suit for declaration, injunction and accounts regarding temple property, the plaintiffs were bound to pay Court-fee under the proviso to section 7 (*iv*) (c) of the Court-Fees Act as amended in Madras only on the value of the immoveable property forming the subject-matter of the suit and that where the land consisted of inam land falling under section 7 (*v*) (c) the fact that there were cocoanut trees on the land was no ground for requiring the land to be valued otherwise than on the basis of fifteen times the net profits. It was held in *Vannappan* v. *Sinnathayee*[4] that a will was not a document "securing money or other property" within the meaning of section 7 (*iv-A*) of the Court-Fees Act as amended in Madras and as such a person suing for a declaration that the will of a deceased was not true in fact and was at any rate invalid in law is not bound to pay court-fee under section 7 (*iv-A*) on the market value of the properties forming the subject matter of the will. In *Sahul Hameed Rowther* v. *Mohideen Pichai*[5] it was held that a plaintiff who alleges that a sale deed executed by him was sham and nominal and prays for a declaration to that effect and for injunction restraining the defendant from interfering with the plaintiff's possession need not pray for cancellation of the sale deed and to value his suit for purpose of Court-fee and jurisdiction under section 7 (*iv-A*) of the Act. In *Kandaswami Udayan* v. *Annamalai Pillai*[6], where the sons sued for partition and possession of family properties alienated by their father, it was held that by filing the suit the plaintiffs had elected to treat the alienation as not binding on them and that the suit was in substance one for possession falling under section 7 (*v*) of the Court-Fees Act and so the plaint was not leviable to court-fee under section 7 (*iv-A*) as amended in Madras. In *Ghulam Dastagir Saheb* v. *Marudai Pillai*[7], it was held that where a new lessee of the property sues for recovery of possession of the property and impleads the landlord and the previous lessee whose lease has been terminated the suit is governed by clause (*xi*) (*cc*) of section 7 and that for the purposes of calculating Court-fee the Court should take into account only the rent payable to the landlord and not also the Government cist agreed to be paid by the tenant to the Government. In *Ramaswami Gupta* v. *Pasupathi Krishnayya*[8], it was held that in the case before the Court there were two separate and independent causes of action and two distinct reliefs which did not necessarily arise from the same subject-matter, namely a relief for recovery of the amount due under a promissory note and a claim for specific performance of an agreement to sell, and that the plaintiff was bound to pay Court-fees on the two reliefs as on "distinct subjects" within the meaning of section 17 of the Court-Fees Act. A plaint in a suit for possession by a private purchaser from a party to a suit after the dismissal of his application under Order 21, rule 97, was held in *Md. Ibrahim Sahib* v. *Krishna Rao*[9] to be leviable to a Court-fee as in an ordinary suit for possession on the market value of the property and that Article 17 (1) of Schedule II of the Court-Fees Act had no application to the case. In *Shanmugham Pillai* v. *Sri Sankaranarayanaswami Devasthanam*[10], it was held that a suit under section 44-B of the Madras Hindu Religious Endowments Act for a declaration that the order of a Collector directing resumption of inam is wrong requires when the lands are worth more

1. (1948) 2 M.L.J. 645.
2. (1948) 1 M.L.J. 269.
3. (1948) 1 M.L.J. 193.
4. (1948) 1 M.L.J. 455.
5. (1948) 1 M.L.J. 270.
6. (1948) 2 M.L.J. 130.
7. (1948) 1 M.L.J. 338.
8. (1948) 2 M.L.J. 104.
9. (1948) 2 M.L.J. 480.
10. (1948) 2 M.L.J. 637.

than Rs. 10,000 a Court-fee of Rs. 500 under Article 17-A of Schedule II of the Court-Fees Act and it cannot be filed with a Court-fee of Rs. 15 under Article 17 (1) of Schedule II of the Court-Fees Act. In *Venkamma* v. *Venkataramayya*[1], it was held that in a suit for declaration that the plaintiffs are the nearest reversioners of a deceased Hindu and that the sale deed executed by his widow is not binding on them, a separate Court-fee of Rs. 100 is payable under Article 17-A of the Court-Fees Act on each of the declarations in the plaint.

LIMITATION.—In *Thokkudubivyanu* v. *Immaniyelu*, In re[2], a petition for review of Judgment, the time for filing which expired during vacation of the High Court was filed only on the day when the judges sat for judicial work, though the Court was open on an earlier day for receiving papers. It was held that according to section 4, Limitation Act, it was barred as being presented out of time. A direction in a settlement that the surplus after meeting the expenses on certain religious purposes shall be applied for the benefit of certain persons, was held in *Syed Abbas Saheb* v. *Syed Amir Haniza Saheb*[3], to be a direction for the distribution of the surplus in named proportions and was a "specific purpose" and that section 10 of the Limitation Act would therefore be applicable to a suit by the persons entitled to the distribution of the surplus. In *Ramaiya* v. *Suryanarayana*[4], it was held that section 15 of the Limitation Act could not be invoked where the institution of the suit in question was not stayed by an injunction order in other proceedings. An admission of liability contained in a statement in a document, if coupled with a statement that the liability has been discharged, was held in *Karamadai Naicken* v. *Raju Pillai*[5] not to amount to an acknowledgment of a subsisting liability so as to save limitation under section 19 of the Limitation Act. In *Mohammad Akbar Khan* v. *Musammat Motai*[6], the Judicial Committee in considering the scope and applicability of section 20 of the Limitation Act with reference to a usufructuary mortgage held that the wording of the section was clear and that it applied only to extend the time for the recovery of the mortgage debt and that it made no reference to the right of redemption and that hence, to extract from it an extension of time for redemption would involve reading into the section something which was not there. Article 23 was held in *Nagappa Chettiar* v. *Trojan & Co.*[7], to be inappropriate to govern a case of a suit for damages for presenting an insolvency petition against the plaintiff, maliciously and without reasonable and probable cause, because the word "prosecution" in that article related to a case where the criminal law is set in motion. It was further held that Article 36 would be the more appropriate article to apply to such a case and that it could not be said that the two years' period commences from the date of the filing of the petition. Before a cause of action can arise in respect of an order of a competent Court the order must have been set aside and so time will begin to run only from that date. In *Hafiz Mohammed Fateh Saheb* v. *Sir Swarup Chand Hukum Chand*[8], it was held by the Privy Council that possession necessary to found a title by adverse possession under section 28 of the Limitation Act was not different in character (though it may be in duration) from the possession required to prevent limitation from running under Article 142 or Article 144. They laid down the tests to be applied in regard to the determination of the nature of the acts of possession and also pointed out the difference in this matter between a trespasser and a purchaser put in possession by an order of Court. In *Suryaprakasa Rao* v. *Maharaja of Pithapuram*[9], their Lordships of the Judicial Committee held that Article 109 would be inapplicable to a suit by the person who is ultimately found to be entitled to an estate to recover the rents and profits received by a party to that litigation who was recognised by the Collector under section 3 (5) of the Madras Estates Land Act as a "land-holder," the reason being that the receipt of rents and profits by the statutory land-holder could not be said to be "wrongful".

1. (1948) 2 M.L.J. 651.
2. (1948) 1 M.L.J. 49.
3. (1948) 1 M.L.J. 469.
4. (1948) 2 M.L.J. 314.
5. (1948) 2 M.L.J. 454.
6. (1948) 1 M.L.J. 130 (P.C.).
7. (1948) 1 M.L.J. 173.
8. (1948) 2 M.L.J. 70 (P.C.).
9. (1948) 2 M.L.J. 52 (P.C.).

It was further held that the right of action to recover such rents and profits would accrue only after the order of the Collector under section 3 (5) is cancelled as a result of the ultimate decision of the Civil Courts and that the plaintiff could not have competently sued the statutory holder for an account of rents and profits each time that rents or profits were received. In *Viswanatham* v. *Balarami Reddi*[1], it was held that a suit against a tenant holding over and continuing in possession for rent would be governed by Article 110. Even if it was assumed that the defendant was in permissive possession of the land and the action against him is one for damages for use and occupation such an action would be governed by Article 115 and not by Article 120, for the action is really based on an implied contract to pay rent and not either on tort or on a statutory obligation. *Ayissa* v. *Kunhaikalanthan*[2], discusses what a plaintiff suing in ejectment on the strength of his title and dispossession should prove and holds that he should establish not only title but also possession within 12 years prior to the suit. When this is proved as required by Article 142, in order to establish prior possession within the meaning of the first column of the article, it is permissible to invoke the aid of the presumption of possession following title which was held to be only a mode of proving prior possession as required by Article 142. In *A. M. A. Firm* v. *Marudachalam Chettiar*[3], the question considered was as to the proper article applicable to a suit by a mortgagee purchaser in execution of the decree on the earlier mortgage who had not been impleaded in a suit by a Municipality to enforce the first charge for property tax under section 85 of the District Municipalities Act. It was held that the Municipality was in the position of a first mortgagee and the sale in pursuance of the charge has not the effect of annulling the prior encumbrances and the mortgagee purchasers on the early mortgage who had not been impleaded in the suit of the Municipality are not barred from proceeding with a suit to enforce the right of redemption under section 91 of the Transfer of Property Act against the purchasers of the property in the sale in execution of the charge decree and that such a suit will be governed by Article 148. It was pointed out that Article 132 would have no application as the suit will not be one for the payment of money. In *Chandrakantam* v. *Chandramouli Prasada Rao*[4], it was pointed out that in view of the decision of the Full Bench in *Ramasubramania Pattar* v. *Karambil Pati*[5], it was impossible to hold that an application for the ascertainment of mesne profits and for the passing of a final decree comes under Article 181 and that it must be filed within three years from the date of the passing of the preliminary decree. An application under Order 20, rule 12, Civil Procedure Code filed in 1945 in respect of a preliminary decree for partition passed in 1937 was held to be not barred even though the decree provided that the mesne profits due to the plaintiff " be determined in a separate petition by the plaintiff in execution." The words " final order " in Article 182 (5) was held in *Nagappa Chettiar* v. *Lakshmanan Chettiar*[6], to imply that the proceeding has terminated so far as the Court passing it is concerned and that hence where the order was made on the memorandum of consent signed by the parties and their advocates and the formal order recited that the execution petition came before the Court to be mentioned as " settled ", there was a final disposal of the execution petition and that the inclusion in the order of such words as " dismissal " or " final disposal " were unnecessary. In *Muthuvenkata Reddiar* v. *Thangavel Chetti*[7] an order on an execution petition filed within three years but re-presented after the expiry of the period fixed for re-presentation without a petition to excuse the delay would be a " final order " within the meaning of Article 182 (5). A formal petition to excuse the delay in re-presentation was considered unnecessary and that the making of the order of dismissal reflects that there was an order excusing the delay. The rejection of an unnumbered petition re-presented long after its return was held not to be a " final order " in *Kuppuswami Nainar* v. *Rangaswami*

1. (1948) 2 M.L.J. 542.
2. (1948) 1 M.L.J. 194.
3. (1948) 1 M.L.J. 284.
4. (1948) 2 M.L.J. 206.
5. (1940) 1 M.L.J. 54 : I.L.R. 1940 Mad. 372 (F.B.).
6. (1948) 1 M.L.J. 350.
7. (1948) 1 M.L.J. 327.

Goundan[1], so as to save limitation for a fresh execution petition. In *Veerabadriah* v. *Seshiah*[2], the decision in *Muthuvenkata Reddiar* v. *Thangavel Chetti*[3], was applied and it was held that the order dismissing an unnumbered execution petition which had been returned but re-presented after time allowed for carrying out certain requirements would be a "final order" within the meaning of Article 182 (5). There appears to be a necessity for an authoritative decision on this point. In *Arunachala Mudaliar* v. *Rajagopala Chetty*[4], the Court held that all that the law requires is there should be a step-in-aid of execution and is not concerned with the question whether the step ultimately turns out to be infructuous or a wrong step. Applying that principle it was held that an application *bona fide* asking for transmission of the decree under a mistake as to the jurisdiction of the Court in regard to the property sought to be proceeded against would be an application in accordance with law and a step-in-aid of execution. Where an execution petition claims an amount in excess of what was rightly due under the decretal order, it was held in *Gopalan* v. *Travancore National and Quilon Bank, Ltd.*[5], that it cannot be said that the application was not in accordance with law. The use of the word "recorded" on an execution application was held in *Govindarajulu Naidu* v. *Lakshmana Aiyar Firm*[6], not to amount to a final disposal of the application. In *Chimman Chettiar* v. *Estate Manager, Sivaganga Estate*[7], it was held that an application for execution presented against a deceased judgment-debtor by mistake due to negligence, but honestly made, was a *bona fide* mistake and that the application though it could not be acted upon by the executing creditor would be an effective step-in-aid for the purpose of saving limitation. In *Venkata Lakshminarasimham* v. *Gomaji & Co.*[8], it was pointed out that Article 182 (5) did not permit any differentiation between an application for execution of a decree and an application to take a step-in-aid of execution and that the starting point of limitation in any case would be the final order passed on the application and not the date on which it was filed. It was also held that an execution application which is returned by the Court, but never re-presented thereafter should be treated as if it had never been presented at all. Where the intervening applications between the earliest and the latest execution applications are essentially different in character from the earliest one, the later application cannot be treated as a continuation of the earliest application. In *Rachapudi Ranga Rao* v. *Subba Rao*[9], was held that an execution application filed by an assignee-decree-holder to a Court before his assignment was recognised and the decree was transferred to it for execution was not a proper application made to a proper Court.

Civil Procedure.—The largest number of cases decided in a year is under the Civil Procedure Code and cover fairly all the important provisions of the Code. The provisions of the Civil Procedure Code were held in *Devichand Moolchand* v. *Dhanraj Kantilal*[10], not to apply to proceedings under the Madras Buildings (Lease and Rent) Control Act and following *Abdul Khadir Hadgiar* v. *A. K. Murthy*[11] and expressing regret at the Civil Procedure Code not having been made applicable to such proceedings, the desirability of making rules making at least some of the important provisions of the Civil Procedure Code applicable to such proceedings was pointed out. An order on an application for stay was held in *Veeraraghavayya* v. *Rattamma*[12], would be a decree within the meaning of section 2(2), Civil Procedure Code, whether the order directs that execution shall be stayed or that execution shall proceed and is hence appealable. *Venkata Jagannadha Rao* v. *Venkatachalamayya Sastri*[13], decides a question as to *res judicata* among co-defendants. There, in a suit on a mortgage to which the mortgagor and his sons as also a subsequent mortgagee were made defendants, on a contest between the prior and subsequent mortgagees, the subsequent mortgage was also found to be valid and binding on the mortgagor's sons and the amount due was also ascertained. This decision was held would

1. (1948) 2 M.L.J. 374.
2. (1948) 2 M.L.J. 369.
3. (1948) 1 M.L.J. 327.
4. (1948) 1 M.L.J. 389.
5. (1948) 2 M.L.J. 113.
6. (1948) 1 M.L.J. 437.
7. (1948) 2 M.L.J. 377.
8. (1948) 2 M.L.J. 488.
9. (1948) 2 M.L.J. 461.
10. (1948) 1 M.L.J. 276.
11. (1947) 2 M.L.J. 482.
12. (1948) 1 M.L.J. 425.
13. (1948) 1 M.L.J. 4.

operate as *res judicata* in a later suit on his mortgage by the subsequent mortgagee. The determination of the questions in the early suit was necessary both in view of the provisions of Order 34, rules 1 to 4, Civil Procedure Code as also " in order to give the plaintiff the relief which he claimed." Where there was an adjudication of title to property based on a settlement, it was held in *Narayanaswami Naidu* v. *Parvathi Bai*[1], that that decision would operate as *res judicata* in a subsequent suit by the children of one of the parties to the prior suit and that Explanation 6 to section 11, Civil Procedure Code would apply. A Bench to which the case was referred had to consider in *Seshagiri Rao* v. *Somasundaram*[2] the competency of a District Judge to transfer a case remanded by the High Court to the Court of a Subordinate Judge. Their Lordships accepted as correct the law as laid down in *Singamsetti Venkataiah* v. *Bopalla Chiranna*[3], that though the decree of the High Court may remand a suit or appeal for disposal by a particular Court, the District Court can exercise the power under section 24, Civil Procedure Code and transfer the suit to any other competent Court for disposal. They explained the decision in *Uthuman* v. *Naina Mahomed*[4], and held that there was no conflict between the decisions considered. An application under section 24 for transfer of a suit to High Court was held in *Subba Reddi* v. *Narayanaswami Reddi*[5], to be in the nature of an original proceeding within the meaning of section 141, Civil Procedure Code and that the procedure of the Court in regard to suits become applicable thereto and hence the High Court will have power to appoint a receiver before the transfer of the suit. In *Nagappa Chettiar* v. *Lakshmanan Chettiar*[6], it was pointed out that the Court which passed the decree has no jurisdiction to entertain an execution application after the decree has been sent to another Court for execution. An order settling the proclamation of sale being an administrative order was held to be not appealable in *Rangachariar* v. *Trinity Bank, Ltd.*[7], without deciding the question whether the matter in dispute being between the judgment-debtors, section 47 would be applicable. Where the last day of the 12 years period fixed in section 48, Civil Procedure Code expired on a sunday it was held in *Rutnaswami Padayachi* v. *Kuppuswami Aiyar*[8], that the execution application filed on the next day was not barred on the principle that a party should not suffer where he is prevented from doing a thing by the act of the Court. In *Rajam Naidu* v. *Meenakshi Ammal*[9], it was held after considering the Privy Council decision in *Raja Krityanand Singh* v. *Raja Prithichand Lal Chowdhury*[10], that section 48 would apply to the liability of the surety under section 145, Civil Procedure Code. The starting point would depend on whether the liability is an absolute one or a contingent or conditional one. The criterion date of the decree for the purposes of section 48, Civil Procedure Code was held in *Lakshminarasinga Rao* v. *Balasubramanyam*[11] to be the date on which the decree becomes operative, namely, that on which the plaintiff is at liberty to file an execution petition to enforce a relief which the Court has granted him. Failure to apply for execution of an executable preliminary decree (for example, money reliefs) within 12 years of the decree would bar the decree-holder from enforcing it subsequently. The scope and effect of section 53 was laid down by the Privy Council in *Rao Bhimsingh* v. *Shersingh*[12]. It was said therein that section 53 was designed to enlarge the class of property liable to execution under sections 50 and 52 and that this is effected by deeming certain property to have come into the hands of the legal representative as property of the deceased which in fact had not done so. On the question which arose in that case, namely, whether an estate which is impartible, and governed by the rule of primogeniture and which is ancestral property which had been attached during the life-time of the holder in satisfaction of a decree against him for compensation in lieu of specific performance remains

1. (1948) 2 M.L.J. 211.
2. (1948) 1 M.L.J. 315.
3. (1914) M.W.N. 317.
4. (1922) 44 M.L.J. 238.
5. (1948) 2 M.L.J. 251.
6. (1948) 1 M.L.J. 350.
7. (1948) 1 M.L.J. 61.
8. (1948) 2 M.L.J. 234.
9. (1948) 2 M.L.J. 215.
10. (1932) 64 M.L.J. 599 : L.R. 60 I.A. 43 : I.L.R. 12 Pat. 195 (P.C.).
11. (1948) 2 M.L.J. 249.
12. (1948) 1 M.L.J. 154 (P.C.).

liable after his death to execution in the hands of his eldest son who has succeeded by survivorship, it was held that the son was the legal representative of the last-holder and the decree-holders were entitled therefore under section 50, Civil Procedure Code to apply to the Court to execute the decree against him with reference to the property in his hands which was liable in execution under section 50. Arrest and detention of civil debtors can be ordered according to *Venkata Subba Rao* v. *Sreeramulu*[1] only where the conditions prescribed in section 51 are strictly satisfied and that reasons must be given everytime a man is ordered to be arrested and in every proceeding where he is ordered to be arrested, even if it is on the same day. It follows that if an order for arrest is made without giving reasons, the Court acts without jurisdiction. In settling the scheme for the administration of a charitable trust involving the appointment of trustees or managers, it was pointed out by the Privy Council in *Guru Shidharudhaswami* v. *Gangadharappa Divate*[2], that it cannot be contended that the Court has no jurisdiction to remove a person nominated as the head of a Math by will by his predecessor when it is found as a fact that that person has by his conduct shown himself unfit for such position. On the important question as to the right of appeal in cases arising under special Acts the Privy Council laid down in *Adaikappa Chettiar* v. *Chandrasekhara Tevar*[3], that where a legal right is in dispute and the ordinary Courts of the country are seized of such dispute, the Courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies, if authorised by such rules, notwithstanding that the legal right claimed arises under a special statute which does not in terms confer a right of appeal. After stating the general principle it was held overruling the Full Bench case in *Nagappa Chettiar* v. *Annapurni Achi*[4], that an order dismissing an application under section 19 of the Madras Agriculturists' Relief Act for the amendment of the decree in a mortgage suit was a decree within the meaning of section 2 (2), Civil Procedure Code and that an appeal lay against it under section 96, Civil Procedure Code, even though the Madras Agriculturists' Relief Act conferred no right of appeal from an order of the Court made under section 19 of the Act. In considering an application for leave to appeal under sections 109 (*c*) and 110, it was remarked in *Ramachandra Rao* v. *Narayana Rao*[5], that every question of law is not substantial and that " substantial " in the context in which it is used in section 110, Civil Procedure Code means substantial as between the parties and not necessarily of general importance to the public; but it does not make it any the less essential, that the question should be substantial, that is to say, it must have some substance in it. It was held that a decision on the question of the admissibility of a document does not make it *ipso facto* a substantial question of law. The Privy Council had to consider the applicability of section 110, Civil Procedure Code in *Pethu Reddiar* v. *Rajambu Ammal*[6] to the case of leave granted to three vendees only where the High Court decreed the suit setting aside fourteen sales and a power of attorney and where the value of the subject matter of suit as well of the appeal was over Rs. 10,000. Negativing a contention that for the purposes of section 110, the case of each appellant must be regarded *separately*, it was held that on the facts of the appeal there was but one " matter in dispute " and that the mere circumstance of a plurality of appellants could not make it otherwise and that it was unnecessary to consider the applicability of section 110. It was said in *Adaikappa Chettiar* v. *Chandrasekhara Tevar*[3] that there is no jurisdiction in revision where an appeal lies. That no revision could be entertained by the High Court under section 115, Civil Procedure Code against an order passed on appeal by an appellate authority appointed under section 12 of the Madras Buildings (Lease and Control) Act as a *persona designata* and not a Court was held in *Chinniah Thevar* v. *F. M. Badsha*[7]. It was ruled in *Molla Madina Saheb* v. *Bhano Bi Bi Saheba*[8], that in a revision against a decree under section 9 of the Specific Relief Act, a new point as to the main-

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1. (1948) 2 M.L.J. 648.
2. (1948) 2 M.L.J. 450 (P.C.).
3. (1948) 1 M.L.J. 41 (P.C.).
4. (1941) 1 M.L.J. 164 : I.L.R. 1941 Mad. 26 (F.B.).
5. (1948) 2 M.L.J. 109.
6. (1948) 2 M.L.J. 25 (P.C.)
7. (1948) 1 M.L.J. 314.
8. (1948) 2 M.L.J. 453.

tainability of the suit cannot be allowed to be raised for the first time. An application to amend the description of an item of property in the plaint schedule and the decree schedule in a suit which was ultimately disposed of by the High Court was held in *Katamraju* v. *Paripurnandam*[1] would be covered by the wide language of sections 152 and 153 as the error had crept into the decree by way of clerical mistake or accident. In deciding as to what constitutes a misjoinder of parties and causes of action, the Court held in *Nilakanta Iyer* v. *Ramanarayana Iyer*[2], that Order 2, rule 3, should be read with Order 1, rule 3 and that in such a matter the Court should be guided principally by the averments in the plaint. The duty of a Court dealing with an application under Order 1, rule 8, was pointed out in *Mohd. Hassan Sahib* v. *Podanur Sunnath Jamath*[3]. The Court has to decide the question as to whether plaintiff's request was a *bona fide* one and they were agitating a proper claim. If the request is *bona fide* and the claim a proper one leave should be granted. A Court would not be justified in refusing leave simply because the parties on both sides are equally balanced. In *Lakshmidevamma* v. *Nagayya*[4], in a suit by a widow against her husband's brothers for a declaration, it was held that an alleged adopted son of the plaintiff's husband would be a party whose "presence was necessary for the determination of the real matter in dispute" within the meaning of Order 1, rule 10, Civil Procedure Code. The Privy Council in *Mohamad Khalil Khan* v. *Mahbub Ali Mian*[5], held that the object of Order 2, rule 2, is to avoid splitting up of claims and to prevent multiplicity of suits and that the correct test in cases falling under Order 2, rule 2 is whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation of the former suit. The meaning of "cause of action" is also explained. That the omission to sign or verify plaint as required by Order 6, rule 14, is not such a defect as could affect the merits of the case or the jurisdiction of the Court was held in *Subramania Pillai* v. *Sankara Pandian Pillai*[6]. The curing of such a defect would come within the provisions of section 99, Civil Procedure Code. Regarding amendment of pleadings there have been five decisions of our High Court during the year under review. In *Panchaksharam Pillai* v. *Rangaswami Pillai*[7], it was held that in a suit for possession of temple property transferred without authority it would be improper to refuse an amendment asking for cancellation of a sale deed. When an amendment sought ousts the pecuniary jurisdiction of a Court, the procedure to be followed is indicated in *Nandula Bhavani Shankaran* v. *Saladi Mangamma*[8]. The Judge should allow the amendment and then return it for re-presentation in the amended form to the higher Court having jurisdiction. In *The Province of Madras* v. *R. B. Poddar Firm*[9], it was held that where a Court allows an amendment which introduces a fresh cause of action which is outside the scope of the suit as originally framed and inconsistent with the allegation made earlier, it acts with material irregularity in the exercise of its jurisdiction and its order is liable to be set aside in revision. Where the object of an amendment is intended to get over a plea of limitation and to cure a defect, it was held in *Ramachandra Naidu* v. *KandaswamiMudaliar*[10], that the amendment should not be allowed. In *Dharmalingam Chetti* v. *A. M. Krishnaswami Chetty*[11], it was pointed out that when a Court has to decide whether an amendment of a written statement is to be allowed or not, that is not the stage when it can canvass the truth or falsity of the allegation in the proposed amendment and such allegation need not and should not be gone into then. Where there are laches, refusal of the amendment is too drastic a remedy. Saddling the party with costs is enough. Even if a plea in the proposed additional written statement is inconsistent with the original plea it was held in *Md. Ibrahim Maricar* v. *Ahmed Maricar*[12], that it can be allowed provided the Court considers it expedient to permit the raising of the plea at that particular stage. *Chinnappa Naidu* v. *Deena*

1. (1948) 2 M.L.J. 301.
2. (1948) 2 M.L.J. 504.
3. (1948) 1 M.L.J. 379.
4. (1948) 2 M.L.J. 362.
5. (1948) 2 M.L.J. 318 (P.C.).
6. (1948) 1 M.L.J. 227.
7. (1948) 1 M.L.J. 337.
8. (1948) 2 M.L.J. 412.
9. (1948) 2 M.L.J. 423.
10. (1948) 2 M.L.J. 577.
11. (1948) 2 M.L.J. 644.
12. (1948) 2 M.L.J. 576.

dayalu Naidu[1], decides that Order 9, rule 9, applies to voluntary as well as involuntary absences. Order 9, rule 9 was held in *Dakshinamoorthy Kandar* v. *Ponnuswami*[2], would not apply to a case where at an adjourned hearing the party appears in person and on refusal of an adjournment refuses to proceed with the case and it is dismissed. It was ruled in *Ayyalureddi* v. *Mallareddi*[3], that the bar applicable to suits under Order 9, rule 9, does not apply to applications made in execution of a decree and that a decree-holder whose execution application, has been dismissed for default is entitled with immunity to make any number of applications so long as they are in time. Order 9, rule 13, was held in *Krishna Udayan* v. *Chinna Pillai*[4], would apply to an *ex parte* order in a reference under section 30 of the Land Acquisition Act as it amounts to a decree and an application to set it aside would be competent. An application under Order 9, rule 13 would not according to the decision in *Manicka Goundan* v. *Krishna Goundan*[5], bar the right to have the decree set aside in revision. Order 16 of the Civil Procedure Code was held in *Viswanathan Chettiar, In re*[6] would govern the issue of summons under section 36 of the Presidency Insolvency Act. That a party can ask for a commission to examine a handwriting expert of his choice as a matter of right was laid down in *Subbaraya Padayachi* v. *Kozendaval Udayar*[7], as also that in this respect there is no difference between an ordinary witness and an expert witness. The meaning of the words " established public conveyance " in rule 19 (*b*) of Order 16 was explained in *Borrayya* v. *Ramakoti Sastri*[8], and it was held that it does not mean disconnected buses belonging to different private companies and plying on different routes and with no certainty of continuous travel. It was also held that any witness however important, is entitled to ask to be examined on commission if he lives beyond the 200 miles and the Court sees no fraud or *mala fides* in the application. The inapplicability of Order 21, rule 2, after a sale of the mortgaged property was pointed out in *Madhava Nayanar* v. *Parameswara Ayyar*[9]. In *Nookaratnam* v. *Venkata Suryanarayana*[10], it was pointed out that the word " wilfully " in Order 21, rule 32, cannot be construed as " unreasonable " and that the refusal of a wife to live with the husband (decree-holder) expressed in unequivocal terms is " wilful " within the meaning of Order 21, rule 32, and that the right of the decree-holder to execute the decree in the manner provided for cannot be denied. The scope and applicability of Order 21, rule 57, both before and after the amendment of the rule was considered in *Sabapathi Pillai* v. *Md. Ilais Sait*[11]. Settlement of a proclamation of sale under Order 21, rule 66 was held to be an administrative order in *Rangachariar* v. *Trinity Bank, Ltd.*[12], and that hence no appeal lay against such an order. In *Srinivasan* v. *Andhra Bank, Ltd.*[13], it was held that it was not obligatory upon the executing Court to embark upon an enquiry regarding the value of the property to be sold and insert such value in the proclamation of sale. By the enactment of new clause (*e*) to sub-section (2) of rule 66 of Order 21, Civil Procedure Code, it must be deemed that the residuary clause (*f*) is intended to cover matters other than the market value. In *Kandaswami Mudali* v. *Narasimha Iyer*[14], it was held that there is no warrant for limiting fraud to a fraud in conducting sale and that hence a sale contrary to agreement between decree-holder and person interested in the property would be fraud on the part of the decree-holder and where there is a sale for an undervalue, the sale is liable to be set aside even though the purchase by the auction purchaser was a *bona fide* one without notice of the fraud. In considering the maintainability of an application to set aside sale on the ground of scaling down of decree subsequent to sale it was pointed out in *Kumaraswami* v. *Mahalakshmamma*[15], that in deciding such a question the principle to be applied is to consider what would have been the position

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1. (1948) 1 M.L.J. 411.
2. (1948) 1 M.L.J. 65.
3. (1948) 1 M.L.J. 381.
4. (1948) 1 M.L.J. 119.
5. (1948) 1 M.L.J. 574.
6. (1948) 1 M.L.J. 241.
7. (1948) 2 M.L.J. 567.
8. (1948) 2 M.L.J. 641.
9. (1948) 1 M.L.J. 68.
10. (1948) 2 M.L.J. 372.
11. (1948) 2 M.L.J. 352.
12. (1948) 1 M.L.J. 61.
13. (1948) 2 M.L.J. 569.
14. (1948) 1 M.L.J. 333.
15. (1948) 2 M.L.J. 232.

had the scaled down decree been pasesd by the Court in the first instance. In *Manickam* v. *Ramanathan Chettiar*[1], it was held that no question of abatement can arise in the case of Civil Revision Petitions, because Order 22 has not been made applicable to them by the Civil Procedure Code or the Appellate Side Rules and there is also nothing in Limitation Act making any of the Articles in schedule 1 applicable to Civil Revision Petitions. In *Sivagaminatha Pillai* v. *Venkitaswami Naicker*[2], it was held that it will be contrary to the letter as well as the spirit of sub-rule (2) of Order 23, rule 1, Civil Procedure Code to permit the plaintiff to institute a fresh suit on the same cause of action where after an appreciable portion of the material evidence has been adduced the plaintiff finds that the evidence is insufficient to establish the case propounded by him in the plaint. That the words "expenses of the commission" in rule 15 of Order 26, Civil Procedure Code can be made to include the expenses of the other party to the litigation was held in *Abdurahiman Settu* v. *Md. Kasam Settu*[3], and also that in suitable cases it can be ordered to be deposited by the party at whose instance the commission was taken out. Where the plaintiffs have sued the partnership in the name of the firm alone and service of summons is effected on one of the partners as provided by rule 6 of Order 30, the subsequent proceedings should continue in the name of the firm as was pointed out in *Vimala and Co.* v. *Sivam & Co.*[4]. The written statement filed by one of the defendants in his name should be taken to have been filed on behalf of the firm and not on behalf of that particular defendant. The powers of a Court under Order 32, rule 15 was explained in *Mohd. Ibrahim Ummal* v. *Sheik Mohd. Marakayar*[5]. It was said that the Court has jurisdiction in determining the question of unsoundness of mind to seek assistance of medical experts and it can compel the party to attend the Court for deciding the question. It can also direct the person alleged to be of unsound-mind to be subjected to the examination of the expert. On the question as to the proper procedure to be followed where an objection as to pecuniary jurisdiction is raised in an application for leave to sue in *forma pauperis*, two views have been taken. The decisions in *Periaswami Padayachi* v. *Ulaganathan*[6] and *Eswaramma* v. *Chinna Kota Reddi*[7], have held that it was competent for the Court to go into the question and decide it and return the plaint for presentation to the proper Court if it is beyond its jurisdiction. But the decision in *Venkatacharyulu* v. *Venugopalaswamivaru*[8], has held that it need not be so determined. The latter decision does not refer to the case law on the matter at all while the others have reviewed the case law and came to a conclusion. Where in an application for leave to sue as a pauper to set aside a compromise decree, the portion of property admitted to belong to the plaintiff under the compromise decree need not be taken into account because the subject matter of the suit is the compromise decree one and entire and it cannot be cut up into divisible parts. That is the effect of the decision in *Ponnambalam Pillai* v. *Panchaksharam Pillai*[9], The right of a respondent in an application for leave to sue as a pauper to show that the suit is barred either by *res judicata* or by limitation and to adduce evidence was recognized in *Mythili Ammal* v. *Mahadeva Iyer*[10]. The scope of the bar contained in rule 15 of Order 33 was discussed and explained in *Ananthanarayana Sarma* v. *Krishnamurthy Aiyar*[11]. It was pointed out that the right to sue in *forma pauperis* is a personal right of the individual who is given the leave to sue as a pauper and the bar imposed by rule 15 of Order 33 upon the unsuccessful applicant affects the applicant alone and does not extend to any other person, like his legal representatives who wishes to enforce his personal right to property by way of suit, after the death of the applicant. The imperative nature of rule 5, Order 34 was stressed in *Madhava Nair* v. *Parmeswara Iyer*[12], and it was pointed out that the sale cannot be set aside unless the decree amount is deposited in Court for satisfaction of the decree and that a payment or adjustment out of

1. (1948) 2 M.L.J. 521.
2. (1948) 2 M.L.J. 367.
3. (1948) 2 M.L.J. 652.
4. (1948) 2 M.L.J. 477.
5. (1948) 2 M.L.J. 277.
6. (1948) 2 M.L.J. 150.
7. (1948) 2 M.L.J. 623.
8. (1948) 2 M.L.J. 570.
9. (1948) 2 M.L.J. 600.
10. (1948) 1 M.L.J. 400.
11. (1948) 1 M.L.J. 17.
12. (1948) 1 M.L.J. 68.

Court will not be compliance with the strict requirements of the Act so as to entitle the mortgagor to claim the benefit of rule 5 of Order 34. In *Venkatachalapathi Rao* v. *Kanchayya*[1], a judgment-debtor who had given security for any decree that may be passed against him was held not entitled to deposit the money and claim the benefit of rule 5 of Order 34, when there has been sale of the property given as security, as there was no decree based on a charge and execution in pursuance of such a decree resulting in the sale of the property. That Subordinate Courts have no inherent jurisdiction to grant a temporary injunction *ex debito justitiae* was laid down in *Kuppammal* v. *Seetharama Iyer*[2]. As pointed out therein, if a case cannot be brought within the four corners of Order 39, Civil Procedure Code the inherent jurisdiction of the Court cannot be invoked to add to the powers thus conferred. This was affirmed in *Subramanian* v. *Seetharama Iyer*[3], where it was held the High Court sitting as an appellate Court hearing appeals from a subordinate Court has no inherent jurisdiction to issue injunction apart from Order 39, Civil Procedure Code. It was also held that proceedings in execution of a compromise decree would not amount to committing an injury within the meaning of rule 2 of Order 39. When an application is made to the High Court under section 24, Civil Procedure Code for transfer of a case to itself it is in the nature of an original proceeding and the provisions of Order 40, rule 1 would be attracted to it by section 141, Civil Procedure Code. On this reasoning it was held in *Subba Reddi* v. *Narayanaswami Reddi*[4], that the High Court will have power to appoint a receiver before the transfer is ordered and after the other side has been served with notice of the transfer petition. In *Ramakrishna Aiyar Dharmam* v. *Umar Salai Mohammed Sait*[5], it was pointed out that it is necessary that special circumstances should exist before an order for security should be directed under Order 41, rule 10 in an appeal in *forma pauperis* and the circumstances in that case were held to fall under the special grounds for a Court ordering security. That the mere fact that additional evidence was tendered before the appellate Court would not justify any remand of the case is what was held in *Srimannarayana Charyulu* v. *Bhavanacharyulu*[6], and *Sri Agneswara Devasthanam* v. *Govinda Pandithan*[7]. When the power of an appellate Court to order remand was to be exercised was laid down in *Veeramma* v. *Lakshmayya*[8]. Under rule 23 of Order 41 the appellate Court can remand a suit, if in reversing or setting aside the decree it considers it necessacy in the interests of justice to do so. It is only when the appellate Court finds it necessary to reverse or set aside the decre that it is entitled to remand the suit. A remand on the ground that the judgment contravened the provisions of rule 5 of Order 20, Civil Procedure Code was held to be not justified. *Venkatarama Aiyar* v. *Unnamalai Ammal*[9], is an important decision where it was held that where a party does not signify his intention of appealing against an order of remand by applying for stay, he cannot appeal against it after the decision at the rehearing on remand. The Privy Council in *Mohammed Akbar Khan* v. *Musammat Motai*[10], lays down the limits to the powers of an appellate Court to admit additional evidence. They say that the power of an appellate Court to admit further evidence under Order 41, rule 27 1 (*b*) is confined to cases in which the Court requires any document to be produced or any witness to be examined to enable him to pronounce judgment or for any other substantial cause. They add that the Court would not be justified in admitting additional evidence where the effect would be to allow the party concerned to fish out evidence in order to prove his case and make up the lacuna in the existing evidence. In *Srimannarayana Charyulu* v. *Bhavana Charyulu*[6], it was pointed out that under Order 41, rule 27, whenever additional evidence is allowed to be produced by an appellate Court, it is bound to record its reasons for its admission and further, the clauses (*a*), (*b*), (*c*) of rule 1 must be considered to find out whether a case is made out for admitting additional evidence.

1. (1948) 2 M.L.J. 185.
2. (1948) 1 M.L.J. 355.
3. (1948) 2 M.L.J. 188.
4. (1948) 2 M.L.J. 251.
5. (1948) 2 M.L.J. 362.
6. (1948) 1 M.L.J. 336.
7. (1948) 2 M.L.J. 413.
8. (1948) 1 M.L.J. 427.
9. (1948) 2 M.L.J. 404.
10. (1948) 1 M.L.J. 130 (P.C.)

An appeal against the rejection of an application to set aside an *ex parte* order in a reference under section 30 of Land Acquisition Act was held in *Krishna Udayar* v. *Chinna Pillai*[1] to be competent under Order 43, rule 1 (*d*) of the Civil Procedure Code as there is nothing in the Land Acquisition Act which is inconsistent with Order 43, rule 1 (*d*). In *Venkateswara Rao*, In re[2], it was held that leave to appeal *in forma pauperis* cannot be restricted to a part of the subject-matter of the appeal. In *Raja of Bobbili* v. *Venku Naidu*[3], it was pointed out that though the proviso (*b*) to sub-rule (2) of rule 4 of Order 47, Civil Procedure Code, makes no mention of the exercise of due diligence, the words " was not within his knowledge or could not be adduced by him when the decree or order was passed or made " must be taken to be qualified by the words " after the exercise of due diligence". The scope and effect of paras. 5 and 17 of the Schedule II, Civil Procedure Code, was the object of consideration and explanation by a Full Bench in *Satyanarayanamurthi* v. *Venkataramanamurthi*[4]. It was thought by the Bench that referred the case to a Full Bench that there was a conflict between *Bala Pattabhirama Chetty* v. *Seetharam Chetti*[5] and *Muthyala Narayanappa* v. *Muthyala Ramachandrappa*[6]. The Full Bench held that there was no conflict between the actual decisions in the two cases and proceeded to decide the case on the construction of paras. 5 and 17. The actual decision in the case was this. Where an agreement provides for arbitration by a named arbitrator or arbitrators and such arbitrator or any one of such arbitrators is not available on account of death, refusal to act or other reasons before an application is made under paragraph 17 of Schedule II, Civil Procedure Code the Court has no power to appoint an arbitrator in his place. It is only if there is no provision in the agreement for the appointment of an arbitrator and the parties cannot agree that the Court has power to appoint an arbitrator. Where, however, on the date of an application under paragraph 17 the arbitrator was alive and died afterwards, the question whether under paragraph 5 another arbitrator can be appointed by the Court in his place will have to be decided on the construction of the particular agreement. If the intention of the parties as expressed in the Muchilika is to be bound by the decision of a named arbitrator, any provision which enables the Court to appoint another arbitrator would not be consistent with the agreement.

CRIMINAL PROCEDURE.—Where though private rights of parties in connection with the holding of a festival in a public road is the subject of a decision by a Civil Court, the question whether those rights can be allowed to be exercised without danger to public peace has according to the decision in *Murugappa Mudaliar* v. *Kuppuswami Mudaliar*[7], to be decided by the authorities responsible for the preservation of the public peace and that where there is a conflict between a public interest and private right the former must prevail. A general order upholding the possession of tenants in a dispute between them and their landlord when the tenants claim under a common title was held to be quite legal in *Muni Servai* v. *Tangaraya Onturiyar*[8], after negativing a contention that there should have been separate findings as to each of the tenants. The question for decision in *Ellappa Naicken* v. *Lakshmana Naicken*[9], was whether on the dismissal for default of a civil suit filed by one of the parties to a proceeding under section 145 in respect of the properties in the hands of a receiver, the other party would become automatically entitled to possession. It was held that though the party in default cannot bring another suit on the same cause of action, it was open to him or to the opposite party to bring a suit for recovery of the profits received by the receiver and that the Civil Court would then have to adjudicate as to who is entitled to the profits. In that suit the title to the property would be adjudicated and it is only that finding on title that will have the force of *res judicata* for the purpose of section 146 of the Criminal Procedure Code. In

1. (1948) 1 M.L.J. 119.
2. (1948) 2 M.L.J. 201.
3. (1948) 1 M.L.J. 356.
4. (1948) 1 M.L.J. 196 (F.B.).
5. (1894) I.L.R. 17 Mad. 498.
6. (1930) 60 M.L.J. 676: I.L.R. 54 Mad. 469.
7. (1948) 2 M.L.J. 458.
8. (1948) 2 M.L.J. 209.
9. (1948) 1 M.L.J. 383.

Surya Row v. *Sathiraju*[1], it was held that there was nothing wrong in a succeeding Magistrate pronouncing in Court the order of his predecessor under section 145 (6) because it is not a "judgment" to which the provisions of sections 366 and 367 of the Code would be applicable. When a Magistrate comes to the conclusion that both the parties to the dispute were in possession of portions of the land in dispute he does not lose all jurisdiction to pass an order under section 145 (6) for attachment as held in *Alagirisami* v. *Veerammal*[2]. A rather novel point fell to be decided in *C. W. Casse*, In re[3] in regard to the scope and extent of a Magistrate's power to record a statement under section 164, Criminal Procedure Code. There, an individual prayed that his statement should be recorded under section 164, Criminal Procedure Code, in order that it may be used for the purpose of an enquiry or trial which might take place in future. It was held that it was not obligatory upon a Magistrate to record the statement of an individual in such circumstances. On the general question it was held that it is not necessary that the Magistrate should be moved by the Police in order that he might record a statement. In cases where the police do not desire to have the statement of an individual recorded, there is nothing to prevent that witness to go to the Magistrate and request him to record the statement and if a Magistrate records his statement and transmits the same to the Court where the enquiry or the trial is to go on, there is nothing wrong in his action. In such a case the Magistrate has a very wide discretion in acting or refusing to act. Where bogus lottery tickets were sold by certain residents of South Canara to residents in Travancore through a resident agent in Travancore or sent by V.P.P. it was held in *Antony D'Silva*, In re[4], that the offence under S. 420, Indian Penal Code, was committed only in Travancore because the purchasers were deceived and made to part with their money only at that place. The Court also considered the effect of the absence of territorial jurisdiction or the certificate of the political agent in respect of some of the charges and held that the mere fact that the Court had no territorial jurisdiction or the requirement of the proviso to section 188, Criminal Procedure Code, had not been satisfied as regards one charge would not in any way exclude the jurisdiction of the Court to entertain another or other charges not similarly affected or render the prosecution under such charges illegal or irregular. Where there were different occurences in different jurisdictions during the course of a rioting, it was held in *Kista Pillai*, In re[5], that section 182 (3) of the Criminal Procedure Code would apply as the occurrences were really part of the same offence of rioting which is a continuing one. As remarked in *Chinnayya Goundan*, In re[6], the authorities are not quite uniform nor easy to reconcile on the question as to the necessity for a complaint under section 195, Criminal Procedure Code where same facts constitute a general offence which does not require a complaint by a Court or a public servant and a more aggravated particularised form of offence. After an exhaustive discussion of the case law on the subject, it was held that it was more in consonance with natural justice and equity that where on the same facts a general offence which does not require a complaint by a Court or a public servant is committed along with a more aggravated particularised form of offence, it is not open to the prosecution to circumvent the provisions of section 195, Criminal Procedure Code by resorting to proceed with the general minor offence without attempting to move the Court or officer concerned for taking action under section 195, Criminal Procedure Code. It was pointed out that in such a case the Court must consider the facts in the complaint as a whole and that if they disclose an offence for which a special complaint is necessary under the provisions of section 195, Criminal Procedure Code the Court cannot take cognizance of the case at all unless the special complaint has been filed. Their Lordships of the Privy Council remarked in *Gokuldas Dwarkadas Morarka* v. *The King*[7], that the concluding words of section 230 Criminal Procedure Code indicated that the Legislature

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1. (1948) 1 M.L.J. 396.
2. (1948) 2 M.L.J. 642.
3. (1948) 1 M.L.J. 404.
4. (1948) 2 M.L.J. 132.
5. (1948) 2 M.L.J. 83.
6. (1948) 2 M.L.J. 448.
7. (1948) 1 M.L.J. 243 (P.C.).

contemplated that sanctions under the Criminal Procedure Code would be given in respect of facts constituting the offence charged. In considering the test for the determination of the question of necessity for sanction, their Lordships of the Judicial Committee held in *Gill* v. *King Emperor*[1], that it was impossible to differentiate between section 197, Criminal Procedure, and section 270 of the Government of India Act and that the words in the two sections have precisely the same connotation. The test as to the necessity for sanction under section 197, according to this decision is, whether the public servant, if challenged can reasonably claim that, what he does he does, in virtue of his office. Applying that test it was held that no sanction under section 197, Criminal Procedure Code, would be needed when a public servant is charged either with an offence under section 161, Indian Penal Code or with an offence under section 120-B read with either section 161, 165 or 420, Indian Penal Code. Similarly it was held in *Doraiswamy Iyer*, In re[2], that sanction under section 197 was not necessary on the facts of the case for the prosecution of a public servant for an offence under section 120-B, Indian Penal Code read with section 409. That there is no difference between any other Magistrate and a Presidency Magistrate in the case of examining the complainant before the postponement of the issue of process and the ordering of an enquiry under section 202 (1) was held in *P.N.S. Aiyar* v. *K.J. Nathane*[3], and also that the non-examination of the complainant by a Presidency Magistrate was an illegality and not curable under section 537. In *Nalliappa Pillai* v. *Palaniandi Ambalam*[4], it was pointed out that in dismissing a complaint under section 203, Criminal Procedure Code, it is not obligatory upon the Magistrate before whom the complaint is made or to whom it has been transferred to give an opportunity to the complainant to show that the report of the police enquiry is wrong. All that he has to do is to consider the statement on oath, if any, of the complainant as well as the result of the investigation or enquiry under section 202, Criminal Procedure Code before he dismisses the complainant. According to the decision in *Gill* v. *King Emperor*[1], when once sanction has been given under section 197 in respect of a charge under section 120-B read with section 420, Indian Penal Code and the charge is subsequently altered into one under section 120-B read with section 161, Indian Penal Code, there would be no necessity for a fresh sanction where the original complaint refers to facts which may equally support either of the charges because section 230 of the Criminal Procedure Code would become operative as soon as the sanction is given. The Full Bench in *Seraje Narayan Bhatta*, In re[5], to which a question of misjoinder of charges was referred remarked even at the outset that no general rule can be laid down as to when different offences can be said to have been "committed in the course of the same transaction" within the meaning of section 239 (*d*), Criminal Procedure Code, and that the question when it arises must be determined on the facts of the particular case. They therefore did not deal with the general principles which arose in the case except in relation to the particular facts of the case. In the case before the Full Bench, four accused were jointly tried, the 1st accused for an offence under section 302, Indian Penal Code, accused 1 to 3 for an offence under section 201, Indian Penal Code and the 4th for an offence under section 201 read with 109, Indian Penal Code and there was no accusation that accused 2 to 4 were in any manner connected with the murder at the time or before it was committed. The Full Bench held that the case did not fall within section 239 (*d*), Criminal Procedure Code and the joint trial of the accused was therefore illegal and that the convictions had to be set aside. In *Harichandran Pagadi* v. *Thangaswami Nadar*[6], it was held that when a litigant files an application in Court stating that he has withdrawn his complaint against his opposite party and for some reason or other the Court is not able to pass orders immediately, it is not open to that litigant later on to come for-

1. (1948) 2 M.L.J. 6 (P.C.).
2. (1948) 2 M.L.J. 116.
3. (1948) 1 M.L.J. 295.
4. (1948) 2 M.L.J. 358.
5. (1948) 2 M.L.J. 139 (F.B.).
6. (1948) 2 M.L.J. 571.

ward and plead that he has changed his mind and that the previous petition should not be acted upon. The language of sub-section (1) of S. 257, Criminal Procedure Code, was held by the Federal Court in *Sudhir Kumar Dutt* v. *King*[1], to be imperative and that the trial Court had no discretion under it to refuse to issue process to compel the attendance of any witness cited by the accused after he has entered upon his defence unless it is of the opinion that the application should be refused for any of the reasons which are specified in the section and which it is bound to record and that any improper refusal is a contravention of the clear provisions of section 257 and amounted to a denial of a valuable right conferred on the accused and would entail a retrial of the case. Where a Magistrate discharges an accused under section 259, it was pointed out in *Mappillaisami Thevar* v. *Muthuswami Iyer*[2], that he has no jurisdiction to set aside his order of discharge and that his only course was to take fresh cognizance of the case on a proper complaint and that the original complaint can be used as a foundation of the new trial. That in a case tried by a Bench of Magistrates there could only be one judgment in any event and not two differing judgments was pointed out in *Subbamma* v. *Ademma*[3], by a reference to section 264, Crimiminl Procedure Code and rule 131 of the Criminal Rules of Practice. The circumstances under which section 307, Criminal Procedure Code has to be applied arose in the case of *Periaswami Nadar*, In re[4], where a Judge's opinion was not to accept the prosecution evidence but the Jury's verdict of guilty was nevertheless accepted by the Judge. It was said in appeal that section 307 should have been applied and the matter referred to the High Court. Neither the fact that it was his own child to whom the accused was much attached that was murdered nor that he showed his remorse after the murder were extenuating circumstances in the opinion of the High Court in *Meerasa Rowther*, In re[5], to warrant a recommendation to Government under section 401, Criminal Procedure Code and rule 259 of the Criminal Rules of Practice for its exercising its prerogative of mercy. It was held in *Chelliah Servai*, In re[6], that where an accused has already had the benefit of an acquittal for an offence under S. 396, Indian Penal Code, section 403, Criminal Procedure Code, is a bar to his being tried again and convicted of an offence under section 395 or section 397 of the Indian Penal Code because offences under sections 395 and 397 are minor offences under section 238, Criminal Procedure Code, when considered in relation to an offence under section 396, Indian Penal Code. On a review of the case-law it was held in *Arunachala Goundan*, In re[7], that the provisions of section 412, Criminal Procedure Code, have never been considered as forbidding the High Court in revision from exercising just as wide powers as if there had been an appeal and that therefore the powers of a High Court in dealing with applications in revision where the accused has pleaded guilty are as ample as if an appeal on the merits had been entertainable. The question whether an order for retrial is necessary where an appellate Court sets aside a conviction on the ground of the trial being improper or irregular was considered and it was held that though that is the usual procedure it need not always be the rule. Sec. 423 of Criminal Procedure Code read with S. 528, Criminal Procedure Code, was held in *Ramaswamy Chetty*, In re[8], to empower a superior Court to transfer a case to itself for retrial. As to when additional evidence may be taken in appeal, it was held in *The Public Prosecutor* v. *Jeevaratnam*[9], that section 428, Criminal Procedure Code, only contemplated cases where there being already evidence on record the Court considers it unsatisfactory or where the evidence on record leaves the Court in such a state of doubt that it considers it necessary to enable it to decide the case to have further evidence. The proper time for agitating the propriety of an order of

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1. (1948) 2 M.L.J. 37 (F.C.).
2. (1948) 1 M.L.J. 301.
3. (1948) 2 M.L.J. 142.
4. (1948) 2 M.L.J. 411.
5. (1948) 2 M.L.J. 162.
6. (1948) 2 M.L.J. 267.
7. (1948) 1 M.L.J. 444.
8. (1948) 2 M.L.J. 646.
9. (1948) 1 M.L.J. 452.

discharge of some of the accused and framing of charges against the others was indicated in *Jayaraman*, In re[1], where it was held that the matter could be taken up in revision only when the Court has finally disposed of the matter. The powers of the High Court in revision in regard to orders of discharge and acquittal were considered in *Kapa Kasi Viswanatham* v. *Bondili Madan Singh*[2], and *Muniswami Chetty* v. *Muniswami Chetty*[3], respectively. In the first case it was held that when a discretion has been exercised by a Court of competent jurisdiction which is not on the face of it arbitrary, the High Court as a revisional Court will not interfere with an order of discharge and further that ordinarily the High Court will not entertain a revision against a discharge by a Magistrate where the aggrieved party has not moved the Sessions Court or the District Magistrate before coming to the High Court. In *Muniswami Chetty* v. *Muniswami Chetty*[3], it was held that the High Court in revision against an acquittal at the instance of a private party would not order a rehearing of the case especially where the offence is a technical and insignificant one and the parties are near relations. The question as to the competency of a reference to the High Court was considered in *Gowleru Kotrappa*, In re[4], and *Dhanaraju*, In re[5]. While in the first case it was pointed out that a reference to the High Court by a District Magistrate on questions of law raised during the coure of proceedings in the lower Court was incompetent because the Legislature has not chosen to give power to a District Magistrate to refer questions of law arising interlocutorily during the course of an enquiry or trial, it was ruled in the second case that references to the High Court are not desirable merely because the Sub-Divisional Magistrate disagrees with the trial Magistrate, especially in cases where the accused has a right of appeal. The nature of the order to be passed under section 471, Criminal Procedure Code, was the subject of the decision in *Public Prosecutor* v. *Nelliappa Pillai*[6], and it was pointed out that as the word "detained" in section 471denotes curtailment of liberty it is obligatory upon the Court to order the detention in a place and not with a person and that hence an order for detention with a relative was not a proper order. In *Rose Mary* v. *Arulswamy*[7], the Court after remarking that the occasional lapse from virtue of a husband would not entitle the wife to ask for maintenance under section 488, Criminal Procedure Code, held that the wife cannot refuse to go and live with her husband, solely on the ground of his having a mistress and that in the absence of cruelty it would not be a ground for her to claim maintenance under section 488. But the children would be entitled to maintenance, if there is a neglect to maintain them. The question whether the availability of a remedy by way of guardianship proceeding would be a bar to an application under section 491, Criminal Procedure Code, was considered in *Rama Iyer* v. *Nataraja Iyer*[8]. It was held therein that a minor has no will of his own and his detention against his father's will is unlawful and that it cannot be said that because it is open to the father to get himself appointed as the guardian of the person of the minor, application under section 491, Criminal Procedure Code is not the proper remedy. It is open to the father to avail himself of any of the remedies open to him. The decision in *Kapa Kasi Viswanatham* v.

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1. (1948) 1 M.L.J. 341.
2. (1948) 1 M.L.J. 223.
3. (1948) 1 M.L.J. 395.
4. (1948) 2 M.L.J. 126.
5. (1948) 2 M.L.J. 557.
6. (1948) 1 M.L.J. 23.
7. (1948) 1 M.L.J. 399.
8. (1948) 1 M.L.J. 125.

Bondili Madhan Singh[1], points out that it is wrong to say that section 494, Criminal Procedure Code, does not authorise the Court to grant permission to withdraw a preliminary register case. It also held that it is not obligatory upon the Court to record any reasons for granting permission to withdraw. The question as to the legality of imposition of conditions in granting bail fell to be decided in *District Magistrate of Vizagapatam*, In re[2]. It was pointed out that in bailable offences there is no question of discretion in granting bail as the words of section 496 are imperative and that in such cases the Criminal Courts have no discretion while granting bail to impose any condition except demanding of security with sureties. Though the provisions of section 511, Criminal Procedure Code, have to be strictly complied with in regard to the proof of previous convictions, it was held in *Wahid*, In re[3], that in cases where the accused himself admits his previous convictions, it would not be wrong to treat it as sufficient proof. That an order for restoration of property could be passed by a revisional Court at the time of dismissing the revision application or within a month of that date, though it may be long after the conviction by the trial Court was held in *Berankutty Haji* v. *Raman*[4], on the strength of the indication contained in section 511 (3). Their Lordships of the Judicial Committee in *Gokul Chand Dwarkadas* v. *The King*[5], have held that a defect in the jurisdiction of a Court owing to an unvalid sanction can never be cured under section 537, Criminal Procedure Code, because it is the sanction which gives jurisdiction to the Court and when there is no valid sanction there is no jurisdiction at all for the Court to try the case. The non-examination of the complainant on oath before postponement of the issue of process and directing inquiry by police was held in *P. N. S. Iyer* v. *K. J. Nathan*[6], to be not an error, omission or irregularity in the complaint but a non-observance of a mandatory provision of law the infraction of which is a disregard of an express provision of law as to the mode of inquiry and as such not a mere irregularity such as could be remedied by section 537, Criminal Procedure Code. It is an illegality which goes to the very root of the matter. Failure to record a fresh sworn statement when the same case is taken on file after a discharge was held in *Mapillai Thevar* v. *Muthuswamy Iyer*[7], to be a very minor irregularity that can be cured under section 537, especially when the objection is not taken in the trial Court. While the impropriety of taking up cases and disposing of them after Court hours was pointed out in *Arunachala Goundan*, In re[8], the pronouncing of an order of acquittal on a Sunday was held in *Satyam*, In re[9] to be not without jurisdiction.

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1. (1948) 1 M.L.J. 223.
2. (1948) 1 M.L.J. 332.
3. (1948) 2 M.L.J. 526.
4. (1948) 2 M.L.J. 257.
5. (1948) 1 M.L.J. 243 (P.C.).
6. (1948) 1 M.L.J. 295.
7. (1948) 1 M.L.J. 301.
8. (1948) 1 M.L.J. 444.
9. (1948) 2 M.L.J. 114.

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THEORY OF RELATION BACK IN ADOPTION AND PRIOR SURRENDER.

It has been held by a long catena of decisions of the Bombay High Court that a surrender by a Hindu widow of the whole of her estate and interest in the property of her deceased husband to a person or persons entitled in reversion operates to defeat a subsequently adopted son, *Rama Nana* v. *Dhondi Murari*[1], *Yeshwant* v. *Antu*[2], *Pandurang* v. *Ishwar*[3], *Krishn Mhatarba* v. *Baban*[4], *Babanna* v. *Channappa*[5], *Shantaram* v. *Keru Krishna*[6]. In the first of these decisions, which is also the earliest, the conclusion is rested on two grounds : (i) On surrender the estate vests in the next heir as an estate of inheritance and an adoption by a widow cannot divest any estate of inheritance unless such estate is at the time of the adoption vested in the adopting widow herself. (ii) It is not merely an alienation for necessity but any transfer within the competency of the limited owner that would bind the adopted son and surrender is such a transfer. With great respect, it may be stated that neither of these grounds is now tenable. No doubt the view had once prevailed not merely that an adoption by a widow cannot divest any estate vested in a person other than the adopting widow herself but that the power of adoption itself would be incapable of execution, *Bhoobun Moyee* v. *Ram Kishore Acharjee*[7]. This view has now been rejected. In *Amarendra Man Singh* v. *Sanatan Singh*[8], the Privy Council after a review of all the authorities has expressly laid down that the validity of an adoption has nothing to do with the " question of vesting or divesting of property " and that the only limitation on the exercise of a power of adoption is that where the duty of providing for the continuance of the line for spiritual purposes which was upon the father and was laid by him conditionally upon the mother, has been assumed by the son and by him passed on to a grandson or to the son's widow the mother's power is gone. In *Anant* v. *Shankar*[9], the Privy Council has shown how the principle operates where the adoption is by the widow of a predeceased coparcener. The observations of the Nagpur High Court in *Bajirao* v. *Atmaram*[10]—" We regard it as clear that a Hindu family cannot be finally brought to an end while it is possible in nature or law to add a male member to it. The family cannot be at an end while there is still a potential mother, if that mother in the way of nature or in the way of law brings in a new male member "—were approved. The Privy Council went on to point out, overruling *Balu Sukharam* v. *Lahoo Sambaji*[11], that if an adoption is valid it cannot be denied effect and a validly adopted son can recover the property from any person in whom it had vested by inheritance or had passd by reverter or in the way of survivorship. For " it is to be remembered that the adopted son is the continuator of the adoptive father's line exactly as an aurasa son and that an adoption so far

1. (1923) I.L.R. 47 Bom. 678.
2. (1934) I.L.R. 58 Bom. 521.
3. A.I.R. 1939 Bom. 79.
4. (1943) 46 Bom.L.R. 634.
5. A.I.R. 1947 Bom. 140.
6. (1948) 50 Bom.L.R. 283.
7. (1859) 10 M.I.A. 279 (P.C.).
8. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642 (P.C.).
9. (1943) 2 M.L.J. 599 : L.R. 70 I.A. 232 : I.L.R. 1944 Bom. 116 (P.C.).
10. I.L.R. (1941) Nag. 707.
11. I.L.R. (1937) Bom. 508 (F.B.).

as the continuity of the line is concerned has a retrospective effect; whenever the adoption may be made there is no hiatus in the continuity of the line," *Pratapsingh* v. *Agarsangji*[1]. The first of the reasons urged for the view that a subsequent adoption cannot operate to defeat a prior surrender by the widow has in view of the observations cited *supra* no longer much force.

The second ground underlying the Bombay view was formulated by Crump, J., in *Ram Nana's case*[2], as follows: "An adopted son can challenge any alienation made by the widow without necessity, but it does not follow that necessity is the one validating circumstance. A widow can alienate for necessity, therefore such alienation is valid, but any act of the widow which is within her powers under Hindu Law would apparently stand on just as good a footing. No doubt the adoption dates back to the death of the father, but the adopted son would appear to be bound by acts done by the person in possession of the estate where those acts are within that person's authority. The effect of the surrender by the widow was that the then reversioner took an absolute estate and as the surrender was an act which is by Hindu law within the competency of the widow it is not easy to see any ground on which the adopted son can challenge it." In *Jeku Dula* v. *Bai Jivi*[3], surrender has been treated as a kind of alienation merely. Some decisions have held that article 125 of the Limitation Act would govern a suit to set aside a surrender just like an alienation, *Kanshi Ram* v. *Mt. Chet Kuar*[4], *Sheo Singh* v. *Jeoni*[5]. In *Shantaram* v. *Keru Krishna*[6], it was considered that, if the theory of "relation back" of the rights of the adopted son cannot upset an alienation made by an intermediate male owner of the property with knowledge of the unexercised power of adoption—a position which was laid down in *Veeranna* v. *Sayamma*[7], and was noticed without dissent in *Anant* v. *Shankar*[8], by the Privy Council—it cannot, by parity of reasoning, affect the rights of the surrenderee from the widow prior to the adoption. Referring to the contention "that in such a case the adoption should take effect as a happening of a contingency to which the rights surrendered had always been subject in like manner as an adoption would have had effect if it has been made before the surrender," Sen, J., remarked: "In our opinion the argument is fallacious. In our opinion, the surrender has the effect of vesting an absolute estate in the reversioner and the adoption cannot be regarded as a contingency to which the surrender is subject . . . . . Though a surrender operates by accelerating the reversion, *i.e.*, the succession, it would appear to operate not as a case of succession but as an act of alienation." Two comments may be made. To regard a surrender as an alienation or conveyance is not correct. Secondly, even so, a clear distinction has been recognised in such matters between cases where third party rights have intervened and cases where the property concerned is still in the family, using that term in its broad sense, the possessor of the property having no special equities in his favour. In the Dayabhaga it is stated[9]: "Therefore those persons, who are exhibited in a passage above cited (section 4) as the next heirs on failure of prior claimants, shall, *in like manner as they would have succeeded if the widow's right had never taken effect*, equally succeed to the residue of the estate remaining after her use of it, upon the death of the widow in whom the succession had vested." The italicised part of the above passage has been regarded by Mookerjee, J., in *Debi Prosad* v. *Golap Bhagat*[10], as subsuming cases of extinction of the widow's interest by renunciation, remarriage and the like and as affording textual support to the doctrine of surrender. Surrender is thus looked upon as a process by which the interest of the limited owner becomes available to the next heir as on her death. From the decided cases it is clear that from early times surrender has been judicially viewed not as an alienation but

1. (1918) 36 M.L.J. 511 : L.R. 46 I.A. 97 : I.L.R. 43 Bom. 778 (P.C.).
2. (1923) I.L.R. 47 Bom. 678.
3. (1939) 39 Bom.L.R. 1072.
4. (1929) I.L.R. 10 Lah. 237.
5. (1897) I.L.R. 19 All. 524.
6. (1948) 50 Bom.L.R. 283.
7. (1928) I.L.R. 52 Mad. 398.
8. (1943) 2 M.L.J. 599 : L.R. 70 I.A. 232 : I.L.R. (1944) Bom. 116 (P.C.).
9. Dayabhaga, XI, 1, 59.
10. (1913) I.L.R. 40 Cal. 721 (F.B.).

as a relinquishment by the widow. In *Roy Chowdhury* v. *Joy Monee Dabee Chowdhurain*[1] it was observed : "It admits of no reasonable doubt that under Hindu Law a Hindu lady in possession can relinquish, and by relinquishing anticipate for the reversioners their period of succession." Likewise in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy*[2], Garth, C.J., remarked : "What is usually . . . . called a "surrender" of a Hindu widow's estate is more properly a 'relinquishment' of it in favour of her husband's heirs. If she died a natural death, those heirs would succeed ; or if she were to become a byragee or otherwise die a civil death, the result would be the same. And as I take it to be clear that when her husband died, she might, if she had so pleased have disclaimed her estate, there would seem nothing objectionable in her relinquishing her estate at any time in favour of her husband's heirs for the time being after she had once accepted it." In *Debi Prosad* v. *Golap Bhagat*[3], Jenkins, C.J., refers to the principle that "the next heirs' succession can be accelerated by relinquishment" as an "established principle." The position is summed up in *Janaki Nath Ray* v. *Jyotish Chandra Acharjya Chaudhuri*[4], where it is stated : "Though the doctrine (of surrender) has undergone development in recent years, yet its basis remains unaltered, namely, that it is the self-effacement by the widow or the withdrawal of her life-estate which opens the estate of the deceased husband to his next heirs on that date." Similarly, in *Bhagwat Koer* v. *Dhanukdhari Prasad*[5], the Privy Council has pointed out that the opening of the estate to the next heirs of the husband by the widow can be achieved by any process having that effect provided that there is a total and *bona fide* renunciation of the widow's right to hold the property. Surrender is thus nothing but a 'relinquishment,' 'renunciation' or 'self-effacement' by the widow. A relinquishment is altogether different from a conveyance or alienation, *Subbanna* v. *Balasubbareddi*[6]. It is true that in *Behari Lal* v. *Madho Lal*[7], in describing a surrender the Privy Council used language containing a mix up of the ideas of relinquishment and conveyance. It was there stated : "It may be accepted that, according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate. It was essentially necessary to withdraw her own life-estate so that the whole estate should get vested at once in the grantee." Likewise certain remarks in *Rangaswami Goundan* v. *Nachiappa Goundan*[8] have been regarded by Sen, J., in *Shantaram* v. *Keru Krishna*[9], as showing that in the opinion of the Privy Council surrender may be viewed as an act of alienation. Turning to *Rangaswami Goundan Case*[8], at more than one place, it is found that the Privy Council has emphasised that surrender is essentially an act of renunciation by the widow and is not to be confounded with alienation and that the distinction between the two should always be kept in view. Thus it is stated by Lord Dunedin : "Here arises that distinction which, as Seshagiri Ayyar, J., most justly observed in the present case, will, if not kept clearly in view, inevitably lead to confusion—the distinction between the power of surrender or renunciation, which is the first head of the subject, and the power of alienation for certain specific purposes which is the second." At another place Lord Dunedin observed : "But in any case it is settled by long practice and confirmed by decisions that a Hindu widow can renounce in favour of the nearest reversioner if there be only one or of all the reversioners nearest in degree, if more than one at the moment. That is to say, she can so to speak, by voluntary act operate her own death." Finally it is stated : "As already pointed out, it is the effacement of the widow—an effacement which in other circumstances is effected by actual death or civil death—which opens the estate of the deceased husband to his next heirs at that date." The reference to surrender as "conveying absolutely" in *Behari Lal's case*[7], in only a statement of the eventual result, the accrual of a new title, and not an identification of the process with conveyance.

1. (1864) 1 W.R. 98, 99.
2. (1884) I.L.R. 10 Cal. 1102, 1108 (F.B.).
3. (1913) I.L.R. 40 Cal. 721 (F.B.).
4. I.L.R. (1941) 1 Cal. 234, 260.
5. (1919) I.L.R. 47 Cal. 466 : L.R. 46 I.A. 259 (P.C.).
6. (1945) 1 M.L.J. 140 : I.L.R. (1945) Mad. 610 (F.B.).
7. (1891) I.L.R. 19 Cal. 236 (P.C.).
8. (1918) 36 M.L.J. 493 : L.R. 56 I.A. 72 : I.L.R. 42 Mad. 523 (P.C.).
9. (1948) 50 Bom.L.R. 283.

The remarks of the Privy Council in *Vytla Sitanna* v. *Marivada Viranna*[1], are too clear to leave any doubt on the point. It is there observed : "The basis of the doctrine of surrender is the effacement of the widow's interest and not the *ex facie* transfer by which such effacement is brought about. The result is merely that the next heir of the husband steps into the succession in the widow's place." The question whether a surrender is a conveyance in any sense of the term is fully examined in *Venkatarayudu* v. *Narayanayya*[2], and answered in the negative. In the course of his judgment Krishnaswami Ayyangar, J., observed : "Does a surrender by a Hindu widow to her immediate reversioners amount to a conveyance, and to a conveyance by her of her property to the surrenderees ? We are clearly of opinion that it does not. It is settled that the true view of surrender under Hindu Law is that it is a voluntary act of self-effacement by the widow having the same consequence as her death in opening up the succession to the next heirs of the last owner. The intermediate estate is merely extinguished and not transferred and the law then steps in to accelerate the succession so as to let in the next reversioners. The surrender conveys nothing in law ; it is purely a self-effacement, which must of necessity be complete . . . . . The fiction of a civil death is thus assumed when a surrender takes place ; and when the reversioners come in they come in in their own right, as heirs of the last owner, and not as transferees from the widow. The principle is not displaced by a reasonable provision being made out of the estate for the maintenance of the widow, as it is settled that a reservation of this character does not detract from the validity of the surrender." The decisions cited show conclusively that a surrender is not to be regarded as a conveyance or alienation of property. The analogy of the competency of an alienation by an intermediate male-holder of the property with knowledge of the existence of an unexercised power of adoption by the widow is unavailing. Even otherwise, in the case of an alienation there is no question of the acceleration of the succession of the next heir of the last full owner.

Even assuming that a surrender may be regarded as an alienation, still it is apparent that all alienations do not and cannot stand on the same footing for purposes of the "relation back" of the rights of the adopted son. In the case of a partition of joint family property among the surviving coparceners and a subsequent adoption by the widow of a predeceased coparcener, it has been held that though a partition is analogous to an alienation in some respects, still the adopted son can re-open the partition, *Sankaralingam* v. *Veluchami*[3]. There is no reason to regard the case of a prior surrender followed by a subsequent adoption differently in regard to the rights of the adopted son. In both cases the transaction is essentially a sort of family arrangement and the property does not travel outside the family. Also as stated by the Privy Council in *Pratapsing* v. *Agarsangji*[4], "it may be that if a Hindu widow lies by for a considerable time and makes no adoption and the property comes into the possession of some one who would take it in the absence of a son natural or adopted, and such person were to create rights in such property within his competency whilst in possession, in such a case totally different considerations would arise." In the case of a surrender no third party rights intervene. The surrenderee has no equity in his favour. The transaction is not one for consideration. If the surrenderee from the widow had created rights in favour of a third party the subsequent adoption by the widow cannot prejudice or disturb such rights. But where the property is with the surrenderee himself there seems to be no reason why the subsequently adopted son cannot reach the same. The reasons mentioned in the Bombay rulings for holding that in such cases the subsequent adoption cannot operate to defeat a prior surrender have lost their force in view of the later developments in the law of adoption evaluating the adopted son's rights.

S. VENKATARAMAN.

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1. (1934) I.L.R. 57 Mad. 749 (P.C.).
2. (1941) 1 M.L.J. 349 : I.L.R. (1941) Mad. 551.
3. (1942) 2 M.L.J. 678 (F.B.).
4. (1918) 36 M.L.J. 511 : L.R. 46 I.A. 97 : I.L.R. 43 Bom. 778 (P.C.).

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THE MADRAS HINDU RELIGIOUS AND CHARITABLE ENDOWMENTS BILL, 1949.

By

K. Balasubramania Iyer, Advocate.

This Bill sought to be introduced in the Legislative Assembly is, at best, a very controversial measure. It proposes for the first time to provincialise the administration of Hindu Religious Endowments. It enables the Government to take control of the administration of all Hindu Religious Endowments in the Province of Madras. The Government would have been well-advised in not introducing a measure like this especially, when the Constitution of the Indian Union is in the stage of being enacted by the Constituent Assembly.

So far, the provisions relating to Fundamental Rights have been adopted by the Constituent Assembly. Article 20 of the Fundamental Rights, Part III of the Constitution clearly recognises the right of every religious denomination or any section thereof:

(*a*) to establish and maintain institutions for religious and charitable purposes;

(*b*) to manage its own affairs in matters of religion;

(*c*) to acquire moveable and immoveable property; and

(*d*) to administer such property in accordance with the law.

This Fundamental Right proceeds on the basis of the Indian Union being purely a Secular State. The Prime Minister and other leaders have repeatedly declared that the main object of the Constitution is to establish a Secular State: Many of the provisions of this Bill, especially those relating to Mutts clearly infringe this fundamental right guaranteed to religious denominations or sections thereof to manage their own affairs in matters of religion. I need not elaborate the points as it has been clearly explained by the distinguished lawyer, Mr. T. R. Venkatarama Sastri in his statement published in the "Hindu" of the 7th February, 1949. While Article 19 ensures the fundamental right of the individual to freely profess, practise, and propagate religion, with certain exceptions mentioned in Article 19 (2), Article 20 of the Constitution ensures the right of religious denominations to manage their own affairs in matters relating religion.

When a Bill relating to Muslim Wakfs was sought to be introduced in the Legislative Council a few days ago, the Leader of the House distinctly stated that the Assembly would hesitate to interfere in the management of the affairs of the Muslim community in matters of religion and stressed the ideal of a Secular State

established under the Constitution. The same principle ought also to hold good in the case of institutions established by the various religious denominations of the Hindu community. For, it cannot be said that the Bill merely seeks to enact provisions purely in regard to the secular administration of religious trusts.

The scope of the Bill is very wide. Under section 86 Government take power to make rules as regards the methods by which religious institutions should promote the interests of the Hindu religion. It seeks to establish absolute control over all religious institutions. A measure of this kind is not called for. There has been no public demand for such a legislation. The fact that there may be cases of abuse or misappropriation of trust funds or mal-administration is no justification for a Bill of this kind. There are provisions of the general law of the land like section 92 of the Civil Procedure Code which enable the Courts to give redress in such cases and to frame schemes for the better administration of the trusts. But it is quite another thing for the Government to assume control over religious institutions.

The Bill obliterates all distinctions hitherto recognised by the previous Hindu Religious Endowments Acts between Mutts, excepted temples and other temples. This is a matter calling for serious consideration, and there is no necessity for such a step. There are essential differences between temples and Mutts calling for different treatment. "In the temple sanctity attaches to the duly installed deity which cannot manage its affairs except through the human agency of a trustee; but no sanctity attaches to the position of a trustee. The Mathadhipati, on the other hand, holds a position of exceptional sanctity. He is looked upon by his disciples much as the Pope is by the Roman Catholic community. He is looked upon as the intermediary between God and man. In this sense, he is much more than a venerable Acharya entitled to the respect and reverence of his followers and disciples. They receive his spiritual ministrations and blessings. They receive orders from him and will never think of giving directions to him."

No control was ever sought to be exercised over Mutts even under Regulation VII of 1817.

Further, under section 5, sub-section (12) of the Bill, the definition of "Religious Endowments" does not exclude gifts of property made as personal gifts to the Head of the Mutt as it has done, of gifts to archakas of temples. This seems to us to be a serious omission. The main portion of the income of the heads of Mutts is from this source. The gifts of property made as personal gifts to the Mathadhipati are not impressed with any trust. Whether his position is one of trust has been discussed and variously viewed. Even the view that his position will not be dissimilar to that of a trustee, has conceded to him a large measure of discretion in the administration of the income or funds in his hands. He is not accountable to any one so long as he expends the funds neither for immoral nor for personal purposes, but only in advancement of purposes within the ambit of his functions. This law in regard to the powers of heads of mutts has been well-established. In the decision of the High Court Report of *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami*[1] two very eminent Judges, Sir S. Subrahmanya Aiyar and Sir V. Bashyam Ayyangar who were fully conversant with the religious observances and sentiments of the Hindu community clearly held that the large part of the income derived from the endowments of the Mutt as well as from the money offerings from disciples and followers was at the disposal of the Head of the Mutt for the time being which he was expected to spend at his will and pleasure on objects of religious charity and in the encouragement and promotion of religious learning. His obligation to devote the surplus income to such

1. (1904) 14 M.L.J. 105: I.L.R. 27 Mad. 435.

religious and charitable objects was one in the nature only of an imperfect or moral obligation resting in his conscience and regulated by the force of public opinion and that he was in no way, whether as a trustee or otherwise, accountable for it in law. This has also been endorsed by the decision of the Privy Council in *Srinivasa Chariar* v. *Evalappa Mudaliar*.[1]

While this has been the established law as regards the powers of the heads of the Mutts, the clauses of the present Bill brush aside, at one sweep, all the powers of the Mathadhipati and makes him a subordinate of the Government officials, in all matters, religious and administrative. The provision as regards the submission of Budgets and expenditure, *i.e.*, section 41, and the power given to the Commissioner and his subordinates to modify scales of expenditure according to their discretion and the power given to the disciples to make suggestions and appeal to the Commissioner in case of non-compliance with them, seriously fetter the discretion given to the heads of mutts and affect the spiritual relationship that exists between the Guru and his Sishyas. Section 42 empowering the Commissioner to appoint Executive Officers to manage properties of Mutts when he desires so to appoint, seriously affects the dignity and status of the heads of Mutts. The power to settle schemes at the instance of the Deputy Commissioner under section 44, and the power to notify under section 49, are calculated to make the Mathadhipatis mere subordinates and servants of the Government and to vest the mutts and their properties completely in the hands of the Government. This is quite opposed to the nature and the spirit of these foundations and their working for all these centuries and contrary to the religious sentiments of the numerous disciples of these Mutts and the Hindu community in general.

Section 16 enables the officers of Government even to enter the sacred precincts of the Mutt and to interfere directly with the Acharyas' personal freedom.

Section 15 (2) gives power to the Commissioner even to control rituals, ceremonies and other religious observances in all religious institutions. These are entirely within the jurisdiction of the head of the Mutt as the sole spiritual authority.

Under sections 6 and 7 the Government are made the dominant controlling authority over the head of the Mutt.

Section 18 makes all the heads of religious institutions including Mutts, obey all orders issued by the Government and its hierarchy of officials. Even the word 'lawful' does not occur before 'orders'. The distinction between excepted temples and other temples has been also entirely done away with. This is sure to hamper the progress and beneficial administration of temples founded by many important rich families in our Province. It is because these families contributed to the support and maintenance of these temples that their hereditary rights as trustees were recognised under the law. The Bill places these trustees on the same footing as other temple trustees and makes them subordinates of Government—a step which may have the effect of making these families cease to take any interest in these institutions. Even in regard to the temples the power of notification is found in some instances to have been abused by those to whom this power was entrusted—*vide* the instances which came to the notice of the High Court reported in *Zamorin of Calicut* v. *Madras Hindu Religious Endowments Board*[2] and in *Ponnuman Dikshitar* v. *Board of Commissioners for Hindu Religious Endowments Madras*[3].

In *Ponnuman Dikshitar* v. *Board of Commissioners for Hindu Religious Endowments, Madras*[3] the following observations of Justice Venkataramana Rao are relevant:

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1. (1922) 43 M.L.J. 236 : L.R. 49 I.A. 237 : I.L.R. 45 Mad. 565 (P.C.).
2. (1929) M.W.N. 1098.
3. (1939) 2 M.L.J. 11 at 14.

"It seems very undesirable that the Board should have taken any step in regard to the notification of this temple. The procedure in regard to notification ought not to be lightly resorted to, unless and until there is such serious mismanagement of the temple as would justify of an ouster of the trustees in charge of temple from their office. We hope and trust that the Board would drop as proceedings in the matter". It will be even more dangerous to entrust such power of notification to the discretion of a single individual like the Commissioner or Deputy Commissioner especially, when no qualifications for appointment as Commissioner are prescribed in the Bill.

Another very serious objectionable feature of the Bill is the almost complete ouster of the jurisdiction of the Civil Courts. The several provisions of the Bill which seek to take away the jurisdiction of the Civil Courts or restrict the scope of their enquiry are retrograde.

The existence of unlimited jurisdiction of the Courts of our land is the best guarantee of the rights of the public as well as of institutions and is in fact the bed-rock of true liberty and democracy.

Section 83 (1) enacts an entire bar of suits in respect of the administration of religious institutions in any Court of law except under and in conformity with the provisions of this Act. Under section 48 (1) orders settling a dispute relating to mere ritual or religious observances or honours cannot be appealed against to the High Court. Orders under section 45 which enables the Deputy Commissioner to direct the surplus to be appropriated to any religious or charitable purposes cannot also be appealed against to the High Court. Government is made the final authority in all questions of even ritual and religious observances and the utilisation of surplus funds. The provisions as regards personal surcharge under section 60, sub-section (3) in respect of trustees of all religious institutions and the power to impose a fine under section 80 are so drastic that they are sure to have the effect of deterring any decent person from being a trustee of a temple and, in the case of the head of a mutt, seriously affect his status and dignity.

The provisions as regards concurrent audit and of audit by officials appointed by Government seriously interfere with the dignity and discretion of the trustees of temples and in the case of heads of mutts unduly fetter their lawful discretion and are wholly opposed to the sentiments of the Hindu community. It is hoped that the Legislative Assembly will not accede to the introduction of the Bill of this kind which offends Article 20 of the Fundamental Rights Part of the Constitution and the provisions of which are likely to defeat even the best intentions of the Government. If even for any reason the Bill is allowed to be introduced, we hope that many of the objectionable features of the Bill pointed out above will be removed before it is passed into law.

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SUMMARY OF ENGLISH CASES.

MOUNTAIN & CO. *v.* RUMERE, LTD., (1948) 2 All.E.R. 482 (C.A.) reversing (1948) 2 All.E.R. 144.

Practice—Action commenced by executrix of deceased proprietor in the firm name under which she continued the business—Substitution of executrix as plaintiff—Permissibility—R.S.C., Order 16, *rule* 2.

The late Alexander Mountain carried on business in the name of Alexander Mountain & Co. and in the course of that business deposited a quantity of steel tubing with defendants. He demanded back this tubing but difficulties arose and an action was begun for damages for detinue or alternatively conversion. The action was commenced describing Alexander Mountain & Co. as plaintiff although Mr. Mountain who was the sole owner of the business was dead at the date of the issue of the writ. When the plaintiff's solicitors discovered that the business had been carried on by Mr. Mountain without any other partner they applied for leave to amend the proceedings by substituting for the description of the plaintiff "Alexander Mountain & Co." the words "Doris Mountain Widow, executrix of Alexander Mountain deceased."

Held, that the case can properly be treated as one of misnomer and the writ allowed to be amended by substituting the executrix as plaintiff.

(1920) 2 Ch. 24 (26), distinguished.

BRITISH CELANESE, LTD. *v.* MONCRIEFF, (1948) 1 Ch. 564.

Master and servant—Agreement that inventions by servant should become sole property of master—Termination of employment releasing employee of his duties under the agreement—Effect—Right of employer to have the patents vested in him.

Where there is an express provision in an agreement that inventions by an employee doing research work for his employer should become the employer's sole exclusive property, the employee will become in effect the trustee of the inventions and he will be under a continuing obligation notwithstanding the termination of the service agreement and his "duties" thereunder, to take all necessary and appropriate steps at the employer's expense to vest the invention in the employer by applying or enabling the employer to apply, for patents in foreign countries as the employer desired so that these should enure for the benefit of the employer or his nominees.

QUAINTWAYS RESTAURANT LTD. *v.* BUDD, (1948) 2 K.B. 231.

Rationing order—Provision specifying quantity of cheese or fat that may be "used" per person per meal served in or by the catering establishment—Processing of excess quantity to prevent their deterioration—If "using" constituting offence.

The amount of fats and cheese which may be used during a particular rationing period in a catering establishment shall not exceed a specified amount per person per meal served in or by the establishment. A registered catering establishment processed quantities of accumulated stock of fat and cheese. In a prosecution for use of excess quantity of the rationed articles it was contended that "used" meant only "consumed" in the catering establishment by the persons served with meals.

Held, the word "used" must be given its ordinary meaning and the rationing order prohibits the use of fats or cheese in the restaurant beyond the specified amount for any purpose. Accordingly the catering establishment were guilty of offences against the rationing order.

LANGFORD PROPERTY CO., LTD. *v.* ATHANASSOGLOU, (1948) 2 All.E.R. 722 (C.A.).

Rent Restrictions Acts—Tenant having home in country and sleeping for two nights in a week in a flat in London when he stayed for business—If entitled to resist claim for possession by landlord of flat as being in personal occupation.

There is nothing in the Rent Restrictions Acts to prevent a tenant having more than one home. His business may require him at different times in the week or different times in the month to be in different parts of the country, and there is nothing to prevent him having a home in those different places. Where the tenant of a flat in London had a home in the country but slept at the flat whenever he required to do so for the purposes of his business (on an average twice a week) but rarely had any meal in the flat, it cannot be said that the tenant was not in personal occupation of the flat. Accordingly he can resist his landlord's claim for possession.

CHAMPANHAC & CO., LTD. *v.* WALLER & CO., LTD., (1948) 2 All.E.R. 724 (K.B.D.).

Sale of goods—Sale by sample "with all faults and imperfections"—Goods not up to sample—Effect.

Where there is a sale by sample the inclusion in the contract of the words "with all faults and imperfections" means that, providing the bulk corresponded in type and quality with the sample, it would be accepted with whatever faults and imperfections it had. Where in respect of such a sale of a quantity of Government surplus baloons it was found on delivery that the material was perished and unmerchantable, the vendor is liable for damages for breach of warranty if the buyer has not rejected the goods. The measure of damages is the difference in value between the goods as they were and the value which they would have had had they complied with the warranty. The sellers are also liable for reasonable loss of profits which the buyers have sustained by reason of having lost the contract for re-sale of the baloons.

HART *v.* GRIFFITHS-JONES, (1948) 2 All.E.R. 729.

Tort—Negligent driving—Death of child in fatal accident—Damages—Loss of expectation of life—Assessment in terms of money—Tests—Funeral expenses—When can be allowed for.

Where as a result of negligent driving by the defendant a fatal accident occurred in which the plaintiff lost his little girl of four; in a claim for damages,

Held, the measure of damages for loss of expectation of life is in effect the loss of prospects of a happy life. In assessing damages the fact that the child had to pass the dangers of childhood should be taken into account. The difference in the value of the £ in 1946 and that in 1941 (when 1941 A.C. 157 was decided) must also be borne in mind.

The cost of embalming the body is properly included in a claim for funeral expenses, but not the price of a monument.

LANCASTER *v.* LONDON PASSENGER TRANSPORT BOARD, (1948) 2 All.E.R. 796 (H.L.).

Master and servant—Linesman injured by negligent driving of trolley bus driver—Common employment—Defence not available.

In an action for injuries sustained by a linesman working on the platform of a tower waggon repairing the overhead wires which supplied electric power for the master's trolley buses through the negligence of the driver of one of the trolley buses, the defence of common employment was raised.

Held (Lord Porter and Lord Du Parcq dissenting) : The trolley buses and the possible carelessness of their drivers did not constitute a special risk to the linesman, but the risk was a general risk of the highway and therefore he was not in common employment with the driver of the trolley bus. The master was liable for damages.

1947 A.C. 368, distinguished ; 1948 A.C. 79, applied and (1947) 2 All.E.R. 267 (C.A.), reversed.

VICTORIA LAUNDRY (WINDSOR), LTD. *v.* NEWMAN INDUSTRIES, LTD., (1948) 2. All.E.R. 806 (K.B.D.).

Contract—Contract to deliver a boiler to plaintiff—Delay in delivery—Damages—Loss of profits which could have been earned by plaintiff—When can be included in.

Sellers who have contracted to deliver a boiler for plaintiff would not be liable for the payment of damages for loss of profits unless there were evidence before the Court that the special purpose of this boiler (for extending existing laundry business of plaintiff) was drawn to their attention and that they contracted on the basis that delay in the delivery would make them liable to payment of loss of profits.

PHILLIPS *v.* DALZIEL, (1948) 2 All.E.R. 810 (K.B.D.).

Emergency legislation—Price control—Price in excess of controlled price marked on box containing foot-wear—" Offer to sell "—If constituted making the shopkeeper liable for contravention of Price Control Act.

In view of the definition in Goods and Services (Price Control) Act, 1941, section 20 that, " References to offer to sell goods, includes references to a notification by a person for the price proposed by him for a sale of goods ", where a foot-wear merchant has marked the prices on the boxes containing shoes, that is sufficient evidence of offer to sell the shoes.

(1943) 1 All.E.R. 315, distinguished.

FOX *v.* HUNTER-PATERSON, (1948) 2 All.E.R. 813 (K.B.D.).

Landlord and tenant—Letter from landlord's agent to tenant's agent that " failing tenant's settling the matter this week we have instructions to take proceedings for possession and damages"—Valid determination of tenancy at will.

In respect of a tenancy at will the agents of the landlord wrote to the agents of the tenant thus: "Failing your client's settling this matter satisfactorily this week we have instructions to take proceedings against her for possession and damages."

Held, the letter was an unambiguous and valid determination of the tenancy at will.

RE LILLY'S WILL TRUSTS, (1948) 2 All.E.R. 906 (Ch.D.).

Will—Construction—Investments securities for money—If includes proceeds of life insurance policies.

Where there is a bequest of all personal property other than "investments securities for money or leasehold property" the exception refers to stock exchange investments and securities like debentures but does not include the proceeds of life insurance policies which will therefore pass under the bequest.

DENNIS REED, LTD. *v.* NICHOLLS, (1948) 2 All.E.R. 914 (K.B.D.).

Contract—Agreement to pay commission on introduction of a person able, ready and willing to purchase defendant's house—Plaintiff finding a person willing to purchase—Right to commission—If must prove that he had the money also at that time.

Where there is an agreement to pay commission to the plaintiff on introduction of a person able, ready and willing to purchase the defendant's house, it is sufficient for the plaintiff who had found such a person to prove that if the vendor had been ready and willing to carry out the contract the purchaser could have found at the proper time the necessary money to perform his obligation. "Ability" does not depend upon whether the purchaser has the money in hand at the time. What the event is which entitles the agent to commission depends on the contract in the particular case.

BALL AND ANOTHER *v.* LONDON COUNTY COUNCIL, (1948) 2 All.E.R. 917 (K.B.D.).

Tort—Negligence—Landlord installing new boiler—Tenant's daughter injured by explosion—Liability.

A landlord who has installed a new boiler which lacked a safety valve is liable in negligence to the tenant for damages for injuries caused to his daughter by an explosion of the boiler, where the condition of the boiler was known or capable of being known to the landlord. The landlord will be liable even though the boiler was put in gratuitously without extra charge. The duty of the landlord depends on the law of Torts and not of Contract. It is a duty that is owed to the persons who, in the ordinary course of human life, would use the things.

BENNET *v.* MILLET, (1948) 2 All.E.R. 929 (K.B.D.).

Contract—Agreement to pay commission on introduction of "purchaser able and willing to complete" purchase—Vendor refusing to complete sale after agent has found a purchaser—Liability for commission.

In pursuance of a contract that in the event of an agent introducing a purchaser who is able and willing to complete the transaction (the sale of a house belonging to the defendant) the plaintiff introduced such a purchaser but the defendant refused to complete the sale and also contended that the plaintiff was not entitled to commission unless the purchaser actually completed the purchase.

Held, the plaintiff was entitled to the commission as he had introduced a purchaser who is able and willing to complete the transaction.

WARREN *v.* HENLYS, LTD., (1948) 2 All.E.R. 935 (K.B.D.).

Master and servant—Vicarious liability of master for acts of servant—Limits—Threat by customer to report employee to his master—Assault by employee—Liability.

Plaintiff purchased some petrol in a garage and the garage assistant incensed the plaintiff by his incivility and violent language. Plaintiff called in a constable who soothed matters to some extent and when the constable was returning to his car, the garage assistant asked if plaintiff was going to report him to the firm and being told "yes" struck the plaintiff who then sued the firm.

Held, the act of the employee was personal retribution for something which he thought would affect him personally. The act cannot be deemed to be done in the course of his employment, it not being an act of a class which the employee was authorised to do or a mode of doing an act within that class.

WRAGG *v.* LOVETT, (1948) 2 All.E.R. 968.

Contract—Estate agent—Authority to sell house—If agent authorised to make particular contract.

Where a vendor merely authorises a house agent to "sell," at a stated price he must not be taken to be authorising the agent to do more than agree with an intending purchaser the essential term, *i.e.*, the price. The making of a contract is no part of an estate agent's business, and, although, on the facts of an individual case, the person who employs him may authorise him to make a contract, such an authorisation is not lightly to be inferred from vague or ambiguous language.

RE GILLSON, (1948) 2 All.E.R. 990 (C.A.).

Appeal—Several parties with precisely the same interests and precisely the same arguments —Costs—Practice is to allow only one set of costs.

When appeals are brought and there are several parties with precisely the same interest and precisely the same arguments who below may have been separately represented, it is the duty of the solicitors concerned to do everything possible to avoid unnecessary costs in the Court of Appeal. Where parties with precisely the same arguments come up to the Court of Appeal and three sets of costs are incurred, while with a little good will and with a desire to avoid multiplication of costs only one set of costs would have been incurred, the practice is to allow only one set of costs, certainly where costs are being charged on residue, for instance, or on a fund the persons interested in which either are absent or are infants and therefore are not in a position to consent.

COMMERCIAL STRUCTURES, LTD. *v.* BRIGGS, (1948) 2 All.E.R. 1041 (C.A.).

Income-tax Act (1918), section 125—Additional assessment if surveyor "discovers" under-assessment—Mistake as to the law applicable to facts—Discovery—If permits additional assessment.

On the plain reading of section 125 of the Income-tax Act if the surveyor discovers that a person chargeable has been under-charged in the assessment an additional assessment can be made. It is immaterial whether the discovery is based on the ascertainment of the correct law applicable to the facts and circumstances or whether it is the ascertainment of some new fact or circumstance.

MONARCH STEAMSHIP COMPANY, LTD. *v.* KARLSHAMNS OLJEFABRIKER AND OTHERS, (1949) 1 All.E.R. 1 (H.L.).

Contract—Breach—Damages—Charterparty—Unseaworthiness of ship—Delay in voyage—Outbreak of war making it impossible for ship to complete voyage—Transhipment of cargo to neutral ship for completing voyage—Cost of—If recoverable as damages—Damages —If remote.

A shipowner ought to have foreseen that within the course of a contemplated voyage, even if protracted, a war would be likely to occur, or if it did, that the carriage of goods to the stipulated range of ports would be prohibited. Where owing to the unseaworthiness of the ship there has been considerable delay and on the outbreak of war the ship had to be diverted by the Order of the Admiralty, the costs of transhipping the goods to a neutral ship for completion of the voyage can be recovered from the owners of the ship as damages for breach of contract. The cost of transhipment was the direct and natural consequence of the breach in the circumstances.

The question whether damage is remote or "natural" and direct can in general only be decided on a review of the circumstances of each special case.

BISHOPSGATE MOTOR FINANCE CORPORATION, LTD. *v.* TRANSPORT BRAKES, LTD., (1949) 1 All.E.R. 37 (C.A.).

Sale of goods—Sale by ostensible owner in market overt—True owner—When can get sale set aside.

A sale in market overt according to the usage of the market, to one who takes in good faith and for value without notice confers a good title on the buyer. This beneficial rule of common law applies not only to open markets created by grant or prescription but also to open markets authorised by statute. When the Legislature authorises the holding of a market it must be taken to intend to attach to it all the privileges attaching to a market by grant or prescription. If the true owner seeks to set aside a sale on the ground that it was not in accordance with the usage of the market, the burden is on him to show it.

The fact that goods are sold not by an auctioneer, but by a dealer or the apparent owner is also no ground for setting aside the sale, unless, indeed, the usage of the market only allows sales to be made by auctioneers.

Where a finance company allowed the hirer to have the motor car and take the registration book of the car (the log book) in his own name and the hirer sells the car in market overt, the financing company cannot have the sale to an innocent purchaser set aside.

LAUDER *v.* LAUDER, (1949) 1 All.E.R. 76 (C.A.).

Husband and wife—Sulking by husband—When amounts to cruelty.

A husband's conduct in deliberately and persistently sulking, causing thereby injury to the wife's health, constitutes cruelty entitling the wife to a decree for dissolution of marriage.

Per Singleton, L. J., dissenting.—There was not such a deliberate course of conduct on the part of the husband which amounted to cruelty. Though the husband could be regarded as inconsiderate at times he cannot be held to have been guilty of cruelty in law. A husband and wife ought to take each other for better or for worse.

THE

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RELINQUISHMENT BY COPARCENER AND SUBSEQUENT ADOPTION BY HIS WIDOW.

The law relating to relinquishment by a coparcener continues to be somewhat obscure despite judicial elucidation in several directions. The textual basis for the doctrine is scanty. According to Manu : " If any one of the brethren has a competence from his own occupation and desires not the property, he may be debarred from his share, giving him a trifle in lieu of maintenance."[1] The text of Yajnavalkya states : " The separation of one who is able to support himself and is not desirous of participation may be completed by giving him some trifle."[2] The giving of the trifle seems to be required more by way of imparting solemnity to the transaction than as any regular consideration for it. As stated by Buhler, all the commentators on Manu are agreed that the reason why the trifle is to be given is that future disputes may be prevented[3]. It is now settled by a series of decisions that a relinquishment to be effective need not be supported by consideration and that the requirement as to a trifle is only a token and is not essential, *Sudarsana* v. *Narasimhalu*[4], *Thangavelu Pillai* v. *Doraisami Pillai*[5], *Veerammal* v. *Kamu*[6]. In regard to the true nature of the transaction of relinquishment, there was at one time some difference of opinion. It was sometimes spoken of as an alienation—see *Peddayya* v. *Ramalingam*[7] and *Thangavelu Pillai* v. *Doraisami Pillai*[5]. This view is inconsistent with the fundamental principle of the Mitakshara law that so long as the family is undivided an individual coparcener cannot alienate his interest in the family property, a principle no doubt relaxed in Madras, Bombay and the Central Provinces but still maintained in other parts of India. Also even in the first set of provinces it is still the law that what is practically a gift of the coparcener's interest is not permissible. Again if a relinquishment is treated as a gift, it would be to attract the provisions of section 123 of the Transfer of Property Act, whereas, under the existing law a relinquishment may be oral and informal. The true position therefore seems to be that a relinquishment is not an alienation but only an extinguishment of the releasor's interest in the joint family property. In *Venkatapathi Raju* v. *Venkatanarasimha Raju*[8], a member of a joint family relinquished

1. Manu, IX. 207.
2. Yajnavalkya, II. 117.
3. S. B. E. Series, Vol. 25, p. 375, f.n.
4. (1902) 11 M.L.J 353 : I.L.R. 25 Mad. 149, 156.
5. (1914) 27 M.L.J. 272.
6. (1915) 2 L.W. 850.
7. (1888) I.L.R. 11 Mad. 406.
8. 71 M.L.J. 558 : L.R. 63 I.A. 397 : I.L.R. (1937) Mad. 1 (P.C.).

his interest, left the ancestral village and settled in another place where he and his descendants ceased to have anything to do with the other members of the joint family. In considering the effect of these facts, the Privy Council remarked : "No definement of shares need take place where the separating member does not receive any share in the estate but renounces his interest therein. His renunciation merely extinguishes his interest in the estate, but does not affect the status of the remaining members *quoad* the family property, and they continue to be coparceners as before. The only effect of renunciation is to reduce the number of persons to whom shares would be allotted, if and when, a division of the estate takes place." The matter has also been considered in *Subbanna* v. *Balasubba Reddy*[1], where it was observed : "The relinquishment by one coparcener of his interest in the family estate in favour of the members of the coparcenary does not amount to an alienation ; it merely amounts to an extinction of his interest in favour of the others. The gift of his interest to one of several other coparceners would not mean an extinction of that interest. It would mean alienation of it. It is well settled law that there cannot be such a gift to a stranger and it is now clear that there cannot be a gift to a fellow coparcener if the family is to remain undivided." In this view it would follow that whenever a relinquishment is made it should be in favour of all the remaining coparceners and cannot be in favour of one or some of them merely. The benefit of the relinquishment appertains to the entire family as such. The observations in *Peddayya* v. *Ramalingam*[2], and *Thangavelu Pillai* v. *Doraisami Pillai*[3] that the relinquishment can be in favour of one or some of the coparceners for his or their benefit alone cannot now be regarded as correct. In *Anandrao* v. *Vasantrao*[4], one *M* had executed a release of his interest in the family property in favour of his father only. The Privy Council held that the release must be treated as being for the benefit not of the father alone but of the entire coparcenary and the shares of the members should be determined as if *M* had died. In *Karnam Singh* v. *Surender Singh*[5], it has been pointed out that a coparcener can renounce only in favour of all the other coparceners and that even if the renunciation purported to be in favour of one alone it would operate for the benefit of all. A number of cases have held that a relinquishment of his interest by a coparcener should be in favour of all the coparceners *Chander Kishore* v. *Dampat Kishore*[6], *Mt. Tulsi Bai* v. *M. Haji Baksh*[7]. The position is neatly summed up in *Subbanna* v. *Balasubba Reddy*[8], where it is said : "A member of a joint Hindu family governed by the Mitakshara law cannot give his interest in the family estate to one of several coparceners if they remain joint in estate. In such circumstances he can relinquish his interest, but the relinquishment operates for the benefit of all the other members." From the point of view of the releasor a relinquishment is tantamount to a withdrawal from or extinguishment of his interest in the property as if he had then died. Where the joint family estate is partible, his right to a share as well as his right to the benefit of survivorship would be lost. If the estate were impartible and he were the holder, the person next in succession designated by primogeniture should

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1. (1945) 1 M.L.J. 140 : I.L.R. (1945) Mad. 610, 617 (F.B.).
2. (1888) I.L.R. 11 Mad. 406.
3. (1914) 27 M.L.J. 272.
4. (1907) 17 M.L.J. 184 : 9 Bom.L.R. 595, (P.C.) on appeal from *Wasantrao* v. *Anandrao*, (1907) 6 Bom.L.R. 925.
5. A.I.R. 1931 Lah. 289.
6. (1894) I.L.R. 16 All. 369.
7. A.I.R. 1938 Lah. 478.
8. (1945) 1 M.L.J. 140 : I.L.R. (1945) Mad. 610, 618 (F.B.).

take. If the releasor were only a junior member, what would be lost is his right to the benefit of succession by survivorship.

A question of some nicety is as to how far the sons of the releasor would be bound by a relinquishment made on behalf of oneself and one's descendants. In its comment on Yajnavalkya's text cited *supra*, the Mitakshara has stated that the male issue of a coparcener who renounces also lose their claim[1]. The Vyavahara Mayukha[2], the Smriti Chandrika[3], and the Viramitrodaya[4] have also taken the same view. Understood literally these would be conclusive, and would apply equally to cases where at the time of the relinquishment there were sons as well as to cases where there were none. Where the family property was partible and there were no sons when the relinquishment was made, the after-born son will naturally be bound. This would be consistent with the rule regarding alienations that a son neither born nor even conceived at the time the alienation was made could challenge its validity. For the afterborn son acquires an interest by birth *quoad* the family property only if the necessary nexus is there, namely, his father's membership of the joint family or possession of any ancestral property. By relinquishment such membership has snapped nor is there any question of ancestral property obtained at partition. If, however, the son had been in existence at the time of the relinquishment, surely, the position becomes different. His birth invests him with rights. He becomes entitled on partition to a share in his own right. Any renunciation by the father, though it may purport to be on behalf of his branch could hardly deprive the son of his independent rights as a member of the joint family on that date. If he is a major his consent would be necessary to make the arrangement bind him. If he is a minor his father would not be competent to sacrifice or prejudicially affect his interest in the family property. In *Mukund* v. *Balkrishna*[5], it was pointed out by the Privy Council that in the absence of a separation or division of the joint family property, a member of the joint family has an indefeasible right to demand partition and his right cannot be affected by a deed executed by his father on the basis of non-existence of the joint family or of joint family property. In *Karnam Singh* v. *Surendar Singh*[6], it has been laid down that the right of the son in the joint family property arising by birth is wholly independent of his father and hence a renunciation of his interest by the father in the ancestral property cannot operate as a relinquishment of the rights of his sons as well. Where the joint family property is an impartible estate the issue becomes somewhat clouded because other factors cut across. There is neither right to partition nor right to common enjoyment available to the members of the family. The holder is solely entitled to the income and is free to alienate the property except where the right has been curtailed, as in Madras, by statute. The junior member on the other hand has only the right to take by survivorship. This is almost like a *spes successionis* except for the fact that the right is the sequel to his right by birth *qua* member of the joint family. Here again if the releasor were a junior member having no son the position would be simple. Would the existence of a son make any difference ? Again would it make any difference if the relinquishment was by the holder parting with the estate in favour of another branch, his son not having joined in the transaction ? In *Chinnathayi* v. *Kulasekhara Pandiyar*

1. I. II. 11-12.
2. IV. 16.
3. II. 1, 40.
4. II. 1, 15.
5. (1927) 53 M.L.J. 468 : L.R. 54 I.A. 413 : I.L.R. 52 Bom. 8 (P.C.).
6. A.I.R. 1931 Lah. 289.

Naicker[1], it is observed generally : " There can be no doubt that a member of a joint family owning an impartible estate can on behalf of himself and his heirs, renounce his right of succession. . . . . . The surrender must be to all the branches of the family or to the head of the family as representing all its members." Whether this observation was intended to cover a case where at the time of renouncing succession the coparcener had sons is not apparent. It is true that a father can by his act disrupt his son's status as a coparcener with himself or as between sons *inter se.* It is doubtful if he has power to bring about their separation that way as against his own collaterals. The spirit of the ruling of the Privy Council in *Suriya Rao* v. *Raja of Pittapur*[2] seems to be against the father having such a power. The facts of the case were no doubt different, but some of the observations of the Privy Council seem to be relevant on the present question. There, the holder of the Pittapur zemin and his undivided brother entered into an agreement that in the event of the failure of male issue at any stage in either line the estate possessed by the particular branch should descend in the line of the other and such descent should not be defeated by making an adoption. At the time the agreement was entered into, the zemindar of Pittapur had an aurasa son who was however not a party to the agreement. When, later on, the question arose as to how far the zemindar's stipulation would bar an adoption by his son or other lineal descendant in that line or the right of such adopted son to succeed to the zemindari, the District Judge observed that no head of the family could so bind his living coparcener, by a contract entered into without the consent of the latter as to deprive him of the right legally incident to his interest in the estate, *viz.*, the right to adopt. The Privy Council, in the course of its judgment, in negativing the binding character of the stipulation as against the son observed : " It is clear that the father of Gangadhara could not bind his son, *who was then in existence*, not to adopt or legally stipulate that if he should adopt, the son so adopted should not inherit." (*Italics ours.*) In the *Padamattur zemin case*[3], *M* the then zemindar of Padamattur had in 1829, on his succession to the Shivaganga zemindari, executed an agreement in favour of his two younger brothers in the following terms : " My junior paternal uncle . . . . . . the zemindar of Shivaganga having departed this life leaving no male issue, I have become entitled to the said zemindari. You as my next youngest brother are appointed as the zemindar of the palayaput of the said Padamattur. But as Parvata Vardhini Nachiar, one of the pattam (royal) wives of our above-mentioned junior paternal uncle, is pregnant we shall act as usual in the matter of the said palayaput in the event of her giving birth to a son. But should she be delivered of a daughter, I and my offspring shall have no interest in the said palayaput, but you alone shall be the zemindar and rule and enjoy the same, allowing at the same time as per former arrangement to the younger brother P. B. Tevar the village that has been assigned to him before." A daughter was born to Parvata Vardhini Nachiar. *M* the executant of the above deed had sons at the time of its execution. The sons were not parties to the deed. Many years later, on a finding by the Privy Council that the junior paternal uncle of *M* the executant had become divided in his lifetime from the branch of the executant, the latter lost his succession to the Shivaganga zemin by survivorship. As to the

1. (1946) 1 M.L.J. 164, 174.
2. (1884) L.R. 13 I.A. 97 : I.L.R. 9 Mad. 499 (P.C.).
3. (1878) L.R. 5 I.A. 61 : I.L.R. 1 Mad. 312 (P.C.).

effect of the above-mentioned deed on the rights of the sons of *M*, the executant to succeed to the Padamattur estate, the Privy Council observed that if *M* "had disclaimed any joint interest, his words of renunciation taken alone would seem to imply that he had given up whatever interest he had, as a male member of the joint family in that estate. Their Lordships agree that such a renunciation would not deprive the descendants of *M* of such future rights of succession as they might afterwards have to that property, *treating it as separate property* quoad *them*" (italics ours). The Privy Council added : "Now the plain meaning of those words seems to their Lordships to be that *M* renounces for himself and each of his descendants all interest in the palayaput either as the head or as a junior member of the joint family. . . . . . . The effect therefore of the transaction was to make the particular estate the property of the two instead of the three brothers, with of course, all its incidents of impartibility and peculiar course of descent and to do so as effectively as if in the case of an ordinary partition between the brother on the one hand and the two younger brothers on the other, a particular property had fallen to the lot of the two." These observations, particularly those italicised are significant. If the reference to "as usual" in the deed meant that Padamattur was to serve as a sort of maintenance provision to an younger brother as against his elder brother becoming entitled to the Shivaganga zemin but was to be retained by the holder in case such succession did not fructify to him, it may be said that in this case inasmuch as the executant had not expressly reserved to himself any such right of reverter if succession was lost to him for a reason other than the birth of a son to Parvata Vardhini Nachiar, he could not recover Padamattur from his younger brother. Likewise his sons would be barred so long as *M* was alive. The Privy Council observation, however, goes further and regards the act of *M* as effecting a severance of his branch of the joint family from the branches of the other two brothers who would continue united. In other words, it would seem that in the case of an impartible estate it would be open to a father to sever by his unilateral act his sons from his collaterals, without the concurrence of the sons. To so read would be to confer upon the father a power which in respect of partible property he does not have as against his sons. The facts in the *Padamattur case*[1], are somewhat special and much clearer authority in regard to the issue might be necessary to accept that result.

The effect of the binding character of a relinquishment made by a coparcener as against a son adopted by his widow fell to be considered in *Bapurao Desai* v. *Ramachandra Desai*[2]. In that case there were two brothers who were members of a Mitakshara joint family. The family property consisted of a watan, which was impartible and succession to which was regulated by primogeniture. The elder of the brothers was the holder but in 1887, he relinquished the property in favour of his younger brother. The releasor died in 1914 and the releasee in 1917. The widow of the releasor made an adoption in 1927 and the adopted son sought to recover the watan from the person who had taken it on the death of the releasee. His main contention was that the relinquishment could not bind him. It is clear that even an aurasa son of the releasor born after the release could not reopen it.

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1. (1878) L.R. 5 I.A. 61 : I.L.R. 1 Mad. 312 (P.C.).
2. (1949) 1 M.L.J. 172 (P.C.).

It would be *a fortiori* in regard to a son adopted long after the death of the releasor. An adopted son cannot have rights higher than those of an aurasa son. The latter position has been recognised in the Privy Council decision in *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards*[1]. Adverting to an argument in that case that when a person adopts a boy, he should be deemed to have covenanted that he would not deal with his property so as to affect the rights of the adopted son, the Privy Council said : " Mr. Mayne's argument that there was an implied contract not to make a will, the consideration for it being the giving of the son to the natural father is a novel one and without any authority to support it. If it were right, an adopted son would be in a higher position than a natural son." Whether a son adopted before the relinquishment of the impartible property in favour of a collateral member of the joint family would be bound by the act of his father is a different matter and may raise difficulties. There can however be no such difficulty in a case where the son came into existence subsequent to the relinquishment. In *Bapurao Desai's case*[2], the Privy Council had therefore no hesitation in rejecting the adopted son's claim.

S. VENKATARAMAN.

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1. (1898) 9 M.L.J. Supp. 1 : L.R. 26 I.A. 83 : I.L.R. 22 Mad. 383, 390 (P.C). 2. (1949) 1 M.L.J. 172 (P.C.).

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PROFESSIONALISM *v.* COMMERCIALISM

BY

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The profession of the law is marked by certain interesting and distinctive peculiarities whose importance and significance deserve to be emphasised. Herein, I shall refer to some of these features relevant to the caption of this essay. It is also well that, on the eve of the Diamond Jubilee of the premier Advocates' Association of Madras, the ideals in this regard, for which the profession stands, are re-affirmed so that its members may keep clear of this worst and most besetting temptation of commercialism. Otherwise, we would not only be justifying the sneers which are lightly hurled at us, but would also be bringing the law itself into deserved contempt.

Ordinarily, the employment of any service results in making the servant owe his duty wholly to his employer. It may seem paradoxical, but it is nevertheless true, that in the employment of legal service the paramount allegiance of the lawyer is due not to his client but to the law. Chief Justice Gibson said, "It is a popular but gross mistake to suppose that a lawyer owes no fidelity to any one except his client and that the latter is the keeper of his professional conscience . . . . . . The high and honourable office of counsel would be degraded to that of a mercenary were he compelled to do the biddings of his client against the dictates of his conscience." The true duty of the lawyer to his client lies in perfect loyalty to the law and the means by which he can promote his client's interests are limited to the ascertainment and vindication of those rights which the law gives him. He is unfaithful to his professional duty, if he knowingly furthers his client's interest beyond the point of legal right, or by means of violation of the law, or even evasion of it. The profession exists to help people in securing their legal rights, not to aid them in devising ways of committing legal wrongs. The super-eminent obligation of the lawyer is thus to be loyal to the law before his

client. In the words of Chief Justice Cockburn, he ought "to reconcile the interests of his clients with the eternal interests of truth and justice."

By way of illustration, I may refer to a case that arose in the American courts. There the plaintiff suing in damages had been assaulted by the defendant in the presence of a sole witness. The witness was unwilling, without consideration, to give evidence of what he had seen. He addressed a letter to plaintiff's counsel in which the importance of his evidence as sole witness to the incident was adverted to. The writer went on to say that he could of course be subpœnæd, compelled to testify, but added: "But when a person is *made to speak*, it is easy for one to *forget* the most important part." He insisted upon a reward and a legal guarantee therefor. Eventually counsel guaranteed to pay a sum to the witness out of any moneys that might come into his hands in settlement of any judgment that might be recovered against the defendant. Upon these facts counsel was charged with professional misconduct. He sought to justify his action on the ground, amongst others, that, if compelled to testify, witness had threatened to forget what had happened, and that the writing of the letter for the purpose of securing truthful testimony was not "an act of malpractice nor any infraction of legal ethics." The Court in punishing counsel with an order of suspension said that counsel laboured under a mistaken notion that his duty to his client was superior to considerations of public policy and added that "attorney's duty to his client is a solemn obligation, but it has never been held that it is greater than law itself. However just the attorney believed his client's claims to be, he may not liquidate it by force of arms, by bribery, or any other unlawful means."

To turn to another peculiarity. The high and responsible duties of the profession of law lie in enforcing the law of the land, in explaining and applying it. We spend our lives as *Vidyarthis* in trying to learn this law which it is our business to declare to others and of whose profound secrets we are the seers. It is this intimate association with the scholarly frame of mind that is one of the spiritual factors in professional life which help to redeem it from commercialism.

Now what, in essence, is this law that we learn, that we may enforce, explain, apply and help to administer; this law which is the working material of our incessant labours. Blackstone visualises it as employing "in its theory the noblest faculties of the soul" and exerting "in its practice the cardinal virtues of the heart." It is to be found not wholly in the volume of established laws or in the reasoning of judicial decisions or in the pages of Statute law. It is to be found, in the words of Sir Thames Craig, in the "Counsels of natural equity which are part of the birthright of man, those original instincts of Right which are inborn in his character and which spring, undefiled and unchangeable, from the ever-enduring authority of the conscience of mankind." In short, the essence of this law is, that it is the fruit of the constant striving of the human spirit after the Right. This unconscious inspiration and influence temper the practical outlook of the professional mind with a share of the detached austerity of the scholar and thereby save it from commercialism. It is to this aspect of the professional life that Lord Macmillan refers when he says: "The difference between a trade and a profession is that the trader frankly carries on this business primarily for the sake of pecuniary profits

while the members of a profession profess an art, their skill in which they no doubt place at the public service for a remuneration, adequate or inadequate, but which is truly an end in itself. The professional man finds his highest reward in his sense of his mastery of his subject, in the absorbing interest of the pursuit of knowledge for its own sake, and in the contribution which, by reason of his attainments, he can make to the promotion of general welfare. It is only by the liberality of our learning that we can hope to merit the place in public estimation which we claim and to render to the public the services which they are entitled to expect from us."

A third peculiar feature of the legal profession is that, in discharging his functions, every member of the legal profession is executing a public trust. To quote Justice Williams of Pennsylvania, " The Practice of the law is more than the private occupation of him who pursues it ; it is the duty of an office in which the Courts and the general public are deeply interested." Counsel are just as responsible to the public at large in the performance of their duties to the clients they serve, as the Judge is in the performance of his. Only in outward form does the Judge appear to discharge his obligations in a sense different from that in which counsel perform their respective duties. The profession holds a monopoly, enjoys a certain privilege and gains a certain status. This status and the attendant privileges are the gift of the community which creates or sanctions them. Professional privileges are thus held in public trust and if the client appears to be the person entitled to the performance of the relative duty it is only because he is a member of the community which created and sanctioned the privileges. As Forsyth puts it " He who has devoted himself to that profession which is as difficult as it is honourable ; who receives in his chamber the most confidential communications ; who directs by his counsel those who come to ask his advice and listen to him as though he were an oracle ; who constitutes himself the organ of those who find themsleves attacked in their persons, their honour, or their fortune ; who brings forward and gives efficiency to their demand, or repels the charges brought against them ; he, I say who does all this, must necessarily require the support of the public. By his knowledge, his talents, his morality, he ought to endeavour to win the confidence and the goodwill of his fellow citizens." This confidence and goodwill can be assured only by professional efficiency which marks the exact opposite of the commercialistic spirit. Counsel's ambition is, or ought to be, to realise the desire to give of the best of himself to the work which his client puts in his way and if ever the attitude of the profession to its work were to be that of giving as much as it pleased, or as little as it can, for the largest reward that it can exact, it would have proved a traitor to the high status which it enjoys as its due, lost its competency for service and forfeited its privileges. It would have forgotten its public trust and turned wholly to the least laudable ways of commercialism.

It is a matter of further interest that in the recent case of *Myers* v. *Elman*[1], the House of Lords have recognised a jurisdiction over practitioners which would embrace within its ambit the power to deal with certain transgressions of duty in relation to the Court savouring of a commercialistic spirit. This jurisdiction is independent of the power that the Court has to strike off from the rolls the name

1. (1940) A.C. 282.

of a practitioner or to suspend him for professional misconduct. It deals with the practitioner as an officer of the Court for breach of duty towards it and is both punitive and compensatory.

In *Myers* v. *Elman*[1], one of the charges laid against the Solicitor was that he prepared and permitted his client to make affidavits of documents which were inadequate and false. The original action in which the Solicitor is alleged to have done this was one in which the plaintiff successfully charged the defendants therein with conspiracy and fraud and obtained a decree for damages and costs. The plaintiff could recover nothing from the defendants and he applied to the Court to direct the Solicitors of the defendants personally to pay the costs adjudged against his clients, on the ground that he had been guilty of professional misconduct. Upon this, a question was raised about the jurisdiction of the Court to make in favour of a party an order against the Solicitor of the opposite party. The trial Judge, Singleton, J., held that as a result of a deliberate policy adopted in the Solicitor's office in the conduct of the defence, the Solicitor increased the plaintiff's difficulties, added to the expense and obstructed the interests of justice and was consequently guilty of professional misconduct as a Solicitor and an officer of the Court. He ordered the Solicitor to pay the costs decreed in the original action against his own clients and in favour of the opposite party. His Lordship said that the Solicitor owed a special duty to the Court as a helper in the administration of justice and that if he were asked by his client to do something which was inconsistent with his duty to the Court it was for him to point out that he could not do it, and, if necessary, to cease to act. The House of Lords confirmed this decision of Singleton, J. Viscount Maugham held that a Solicitor was not entitled to assist his clients in any way in dishonourable conduct in the course of the proceedings, and that he could not connive in a fraud and defeat the ends of justice. Lord Atkin stated that the Solicitor's act may well amount to conduct which is aiding and abetting a criminal in concealing his crime. Lord Wright described it as conduct which involved a failure on the part of the Solicitor to realise his duty to aid, in promoting in his own sphere, the cause of justice.

1. (1940) A.C. 282.

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THE DIAMOND JUBILEE OF THE MADRAS ADVOCATES' ASSOCIATION.

The celebration of the Diamond Jubilee of the Madras Advocates' Association is an historic event of which every individual member thereof may be justly proud. That an Association started by twenty four members, sixty years ago, should have grown into such an important and respected body as the present Advocates' Association speaks to the steady and useful work done by the institution all these years. Though the lawyer class has of late, most unjustly, become a much maligned community, its place as an integral part of the administration of justice can never be denied and it is upto the members of the Bar to win back to themselves by their conduct and rectitude the respect and admiration which they once commanded. The Association has always striven to maintain the high traditions of the Bar and by its collective moral opinion has created in our Province a very high standard of professional conduct. The members of the Bar would do well to keep in mind the words of The Hon'ble Sir Harilal J. Kania, the Chief Justice of India in his presidential address to them that the highest standard of professional conduct consisted in following three cardinal principles *i.e.*, " (1) Be true to yourself, (2) Be true to your client, (3) Be true to the Court."

The Association has been a place where Advocates, young and old, senior and junior alike have always met and discussed a variety of topics, much to their mutual advantage. It has to some extent helped to create a sense of camaraderie, though one would wish it had become developed much more than is evident at present. The extremely cordial relationship that exists in Madras between the Bench and the Bar is in no small measure due to the fact that most of the judges have been members of the Association and have moved freely with their comrades at the Bar and even after their elevation to the Bench continue to feel that they are still one with the Bar.

The splendid library which has been built up over the course of these sixty years, though not fully utilised, is available to the ardent and studious seeker after knowledge.

Though the Association as a body has been considering and giving its opinions in regard to some of the proposed legislative measures, it would be very much better if this is done more systematically and thoroughly so as to compel consideration and attention being paid to the opinion of those who are the mos

competent to have a say on the subject. In this connection one cannot emphasise too much the excellent suggestion made by our Chief Justice in his address inaugurating the celebrations that some of the members of the Association "form study circles to critically review contemporary legislation and examine problems of constitutional and international importance and give the benefit of their studies not only to the profession but to the general public as well."

The Association has always been watchful of the interests of the Bar and zealous of maintaining and safeguarding its privileges and whenever occasions arose has strongly agitated for the recognition of the just claims of the members of the Bar.

The addresses delivered during the course of the celebrations by eminent and responsible persons, which are reproduced in the following pages, contain among other things, valuable pronouncements on the place of the law and the lawyer in public life, the administration of justice, the necessity for an independent judiciary and an All-India Bar and the question of a common language which must all be given thoughtful and serious consideration by not only the members of the Bar but also by those in authority.

We wish the Madras Advocates' Association a greater and more glorious future.

INAUGURAL ADDRESS DELIVERED BY HIS LORDSHIP THE HON'BLE MR. P. V. RAJAMANNAR, THE CHIEF JUSTICE OF MADRAS.*

I must first thank the Madras Advocates' Association for the great honour they have done me by inviting me to inaugurate their Diamond Jubilee Celebrations. I particularly appreciate the honour because I have been a member of the Association for nearly a quarter of a century and I had the privilege of being its Secretary in 1939-1940. When the Golden Jubilee Souvenir was published, Mr. Narasimha Ayyar and I were the Secretaries. And I suppose that I can also claim by right of birth a share in the privilege which my father enjoyed of being its Secretary for a continuous period of ten years from 1923 to 1933.

As most of you know, this Association was born in the office of Rao Bahadur P. Anandacharlu on Friday the 1st March, 1889. Today it is celebrating its Shashtiabthapoorthi, but unlike a man who at sixty is weaker than when he was young, this Association is stronger than ever today. May God bless the Association with immortality. Forty years hence I hope it will celebrate its centenary though most of us may not be present to join in the celebrations.

It is impossible for a comparatively young man like myself to fully comprehend the enormous changes that have taken place in the country and in the profession since 1889 when this Association was started. Probably a veteren like your beloved President Sri V. V. Srinivasa Ayyangar may be able to describe graphically the picture then and the picture now. I shall give one example only of the change in outlook. The Executive Committee of the Association passed a resolution on 18th July, 1889, approving of the suggestion that vakils should wear gowns, and its first annual report records that at the instance of the Association the Hon'ble the Judges conferred upon vakils the privilege of appearing in gowns before the Court. On 6th December, 1889, the general body passed a resolution that vakils shall wear black coats and white turbans with or without lace and that it shall be optional to wear boots and trousers. After a cycle of sixty years we have arrived

*15th of April 1949

today at a stage when at least a section of the Association feels strongly like asking the Hon'ble the Judges for the privilege of not appearing in gowns or black coats.

This Association has had a glorious career. Among its Presidents and Secretaries we find such distinguished names as Raja T. Rama Rao, Dr. Sir S. Subramania Iyer, Sir V. Bhashyam Ayyangar, Sir C. Sankaran Nair, Mr. V. Krishnaswami Iyer, Mr. P. R. Sundara Iyer, Sir P. S. Sivaswami Iyer, Sir K. Srinivasa Ayyangar, Mr. S. Srinivasa Ayyangar, Sir Vepa Ramesam, Sir C. P. Ramaswami Iyer, Sir M. Venkatasubba Rao and Mr. T. R. Ramachandra Iyer. It has one of the best law libraries in the Presidency and undoubtedly in spite of shortcomings here and there which are inevitable, the Association has well fulfilled the purpose for which it was started, namely, "for the purpose of mutual co-operation and better safeguarding the interests of the profession." There is of course considerable scope for further development in many ways including making provision for the unfortunate members of the profession in distress and suffering.

If I am not being pedagogic, I have one suggestion to make. I wish some of the younger members of the Association form study circles to critically review contemporary legislation and examine problems of constitutional and international law and give the benefit of their studies not only to the profession but to the general public as well. For, neither the politician nor the senior lawyer has the time or the inclination to devote himself to juristic or theoretical studies.

It is a matter for gratification that the Hon'ble the Chief Justice of India should be able to preside on the concluding day of the Celebrations. His presence demonstrates the unity of the Bench and the Bar in a Free India. He has been himself one of the most eminent lawyers of Bombay and therefore one of you, and the interest that he has taken in you should serve you as a source of inspiration.

On an occasion like this I think I will be justified in speaking to you a few words about certain grave charges which have been generally levelled against the existing legal system and the scheme of judicial administration. I shall speak of them not as one with authority but as a citizen and a student deeply interested in matters vitally affecting all of us and I shall strive to steer clear of any vested interests or personal prejudices. The world itself is now passing through a most momentous epoch in its history. This may be a commonplace saying but for that reason it does not cease to be true. In addition to the problems which India shares in common with other countries, there are problems peculiar to itself which the advent of independence has thrown into prominence.

The first charge is that what is being administered today in Courts with the help of lawyers is only law and not justice. This charge is made not merely by a few irresponsible or ill-informed people but sometimes by highly educated persons occupying respected and responsible positions in the public life of our country. The implication of this charge is that the present system of administration of justice is not concerned with what is just or unjust and would not hesitate to perpetrate injustice on the ground that it was legal, *i.e.*, in accordance with the law. I shall endeavour very briefly, having regard to the distinguished nature of the audience, to analyse this charge and show that it is based on fallacies and assumptions which on account of their vagueness and inconsistency are dangerous and misleading. Now, it is quite true that what the Courts today administer and what the Courts base their decisions on, is 'justice according to law.' For one thing it is not justice according to the whims and fancies of the presiding judicial officer. It is not justice determined by tests of ordeal or by the drawing of lots. What is law? What does it consist of? Law, as you know, comprises the statutes in force, the personal law of parties as judicially interpreted and modified by custom and certain more or less general principles of jurisprudence, often described as principles of 'justice, equity and good conscience.' If the decision of a particular dispute is governed by any provision of a statute in force the Court is bound to decide in accordance with it. If the dispute relates to the rights of parties which have to be determined

by their personal law the Judge to the best of his lights tries to apply the relevant rules of law with the help of judicial precedents or a custom which has acquired the force of law. If, however, the nature of the dispute is such that neither statute law nor personal law can have any application to it, then the Judge is bound to decide according to the general principles of justice, equity and good conscience. These principles have become crystallised in their application to particular sets of circumstances by a course of judicial decisions. The Judge therefore ordinarily respects such established principles.

What exactly do persons mean when they level the charge that the Courts only administer law and not justice? They mean possibly several things. For instance, when they find that a particular provision in a statute is not in accordance with their own notions of what is just and proper and when Courts decide, as they are bound to, in accordance with such a provision, they exclaim that the decision may be in accordance with the law but is not in accordance with justice. A moment's reflection will convince you that the accusation on such a basis is wholly unjust and improper. There is not a single question on which opinion is not divided as to what is just and what is unjust. Apart from that aspect, if a particular statutory provision is oppressive or undesirable or unjust, the appropriate procedure to obtain redress is to bring about its repeal by legislation. No law is immutable or perfect. The Legislature has supreme powers. If there is a consensus of opinion or even an overwhelming body of opinion that a particular statute or a particular provision in a statute is obnoxious to the prevailing conceptions of what is just and proper, then surely legislation ought to be and will be undertaken to remedy the evil. But till that is done one cannot expect a Court to disregard a statutory provision in force. Likewise, with rules of personal law though here we are in a realm of doubt and uncertainty and conflicting ideology. To give only one instance. There are thousands today who sincerely believe that it is injustice to deny the daughter a share in her father's estate, but there are also thousands who equally sincerely believe that it is unjust to compel the son to share with the daughter. It cannot be that these critics want judges to decide disputes not according to established rules of personal law but according to their individual notions of what should be the personal law of the parties. Equally it is clear that if tomorrow the Legislature enacts a provision enabling the daughter to share with the son the estate of their father and a Court of law applies, as it is bound to, the new enactment, it will be idle for those who may hold an opinion contrary to the enactment to say that such a decision may be in accordance with the law but is not in accordance with justice. When we come to general principles of justice, and equity, there is again a difficulty. Where are these principles to be found? For one thing, to find them in reported decisions of eminent Judges is to assure both the litigant, the lawyer and the Judge of some certainty. But in this sphere Judges at least of the highest tribunal do enjoy more freedom than in the other spheres of statutory law and personal law. A principle of law considered to be just and equitable by Judges of one age may be dissented from and overruled by Judges of a succeeding age when there has been a change in the prevailing notions of what is just and proper. Lastly, in cases in which no established general principle is available for assistance, a judge enjoys the utmost freedom in finding for himself a legal principle in accordance with justice.

Sometimes when the critics make the above charge they have in mind individual cases. Occasionally the law may appear to be harsh in its application to an individual case. It may be that the framers of a particular provision did not contemplate its application to certain circumstances and did not provide for exceptions. A Court which cannot itself embark on legislation naturally applies the statutory provision and the result may on occasions be, it may be confessed, one not contemplated by the framers of the statute. Then people remark "That may be the law, but that is not justice." But I am sure they would one and all subscribe with enthusiasm to the greatness of the conception of justice as a blind goddess holding the scales even, making no distinction between person and person and

that every person is equal before the law. Only they fail to recognise that the logical and inevitable result of this conception of equality before the law is that in individual instances the law may appear to lead to injustice ; but nevertheless the law must be applied irrespective of the consequence in individual cases.

The practice of hard cases making bad law may lead to judicial dishonesty of a peculiar variety and as there are always two sides in every dispute it may mean injustice to the party who is being deprived of a right to which he is entitled under the law of the land.

Again and again in the history of the world, particularly at times like the present of disillusionment and doubt, simmering with revolutionary ideologies when there is a tension between tradition and progress, the idea of absolute or natural justice has an irresistible appeal to persons who are dissatisfied with the existing state of things and consequently with the system of law and judicial administration which appear to them to perpetuate such a state. The search of mankind for absolute, natural justice is an age-long search but a search which has always failed. But this failure was inevitable ; it was inherent in the search itself. This is because mankind's notions of justice in the different spheres of human activity and relationship have changed and go on changing with changing social, political and economic conditions. For example, there was a time when the conception of freedom of contract appeared to be an essential feature of justice between man and man. But changed economic conditions have revealed that in certain circumstances freedom of contract may be a travesty of freedom. Ideas of social and economic justice brought about a change and consequently we find legislation restricting freedom of contract. In Russia during the first revolutionary period the only written laws to be applied were the decrees of the Soviet Government. If there was no Soviet law ruling the issue, then "the socialist consciousness of justice had to decide." During the second revolution the judge was no doubt given freedom of decision which was regarded as characteristic of revolutionary law, but law was understood as serving the needs of revolutionary developments as opposed to formal and conservative legality. Revolutionary legality and revolutionary consciousness of justice were deemed to be the correct application of the law in the sense intended by the revolutionary State. According to the socialist legal theory all desirable evolution of the economic life must find its expression in the laws. In course of time, however, the Soviet Civil Code was enacted to give some amount of certainty to the law (*vide* Schlesinger's Soviet Legal Theory).

In a discussion of this subject the big question which arises is, what is the function of law ? Is it to verify and formulate existing usages and notions of traditional justice or is it to be used as an agent of progress ? Recent tendencies have been to look at law from the latter aspect, to perceive it against the social background and the needs of contemporary life. There has been a systematic attempt to adjust in accordance with the prevalent ideas of the time of social and economic justice the relative and respective claims of employers and employees, of landlords and tenants, etc.

It cannot be gainsaid that ultimately every ideal of justice must be taken from the political theory and philosophy of life prevalent at the time. The eternal problem, whether the individual or the community or the group is the ultimate yardstick, is a problem which is solved in different ways at different times. Broadly speaking, the solution has been either a subordination of one to the other or an attempt to blend the two rival claims.

Is there any likelihood, one may ask with a sense of frustration, of this conflict ever ceasing ? Will the quest for natural and absolute justice be ever successful ? In other words, will there be ever a time when justice according to law will be interchangeable with the conception of law according to justice ? The answer depends not on legal theory or ratiocination but on human conduct and morality. So long as man is selfish, the conflict is bound to be there. "Individuals or small groups coveting power or wealth use the organisation of a political community

for their purposes. Modern dictators use the masses for their ambitions and disguise it under the name of some collective idea, be it state, nation or race."

I believe I have fairly indicated how impossible it is to depend on more or less vague notions of absolute or natural justice in the decision of disputes in a suit. Hamilton, L.J., (afterwards Lord Sumner) referring to certain dicta of Lord Mansfield made the somewhat caustic remark : " Whatever may have been the case 146 years ago, we are now not free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled justice as between man and man." (1913, 1 Ch. at 140).

Ancient Indian writers on law well recognised the limitations of the application of natural or absolute justice and that *apriori* notions of what is just should yield to local usages and enactments by the State. The four kinds of law applicable in the decision of a disputed case were Dharma, Vyavahara, Charitra and Nripa Ājna. Dharma here comprises what we may call *apriori* natural justice.

दोषकारी तु कर्तृत्वं धनस्वामी स्वकं धनम् ।
विवादे प्राप्नुयाद्यत्र धर्मेणैव स निर्णयः ॥

An offender is convicted ; money is adjudged in favour of the owner. This corresponds exactly to what a learned writer on legal theory has said : " Punishment must redress crime. Reparation must redress civil wrong. Damages must restore wrongful gain."

Vyavahara is defined thus :

स्मृतिशास्त्रं तु यत्किंचित्प्रथितं धर्मसाधकैः ।
कार्याणां निर्णयार्थे तु व्यवहारः स्मृतो हि सः ॥

This consists in the application of a Smriti rule as propounded by those who were learned in Dharma. It is interesting to read the definition of Charitra :

यद्यदाचर्यते येन धर्म्यं वा धर्म्यमेव वा ।
देशस्य चरणान्नित्यं चारित्रं तत्प्रकीर्तितम् ॥

It is significant to note that an usage even when it is not in consonance with Dharma is binding. Lastly, we have the Raja Sasana which supersedes Dharma, Vyavahara, and Charitra.

न्यायशास्त्रविरोधेन देशदृष्टेस्तथैव च ।
यं धर्मं स्थापयेद्राजा न्याय्यं तद्राजशासनम् ॥

Giving modern names, these four would be (*i*) rules of justice, equity and good conscience or natural law, (*ii*) common law, (*iii*) custom and (*iv*) legislation.

The second major charge levelled against the present legal system and administration of justice is that it is very complex and cumbrous. The cry is for simplicity almost pristine in character, with an emphasis on panchayats and a tirade against Courts and lawyers. Some of the critics often speak of the good old days in which there was no litigation and there were no lawyers. I am afraid that such persons are evidently speaking, if they are speaking of facts, of the days immediately preceding the advent of the British and other foreign trading companies, when after the break-up of the Moghul Empire there was practically no centralised government and no established hierarchy of administration or judicial institutions. They forget that they were among the worst days in Indian history. They equally overlook that it is only when there is a strong and stable government and a centralised administration of justice there could be anything like the development of a scientific system of law in the modern sense. In the really great and significant

epochs of Indian history, whether under the Hindu rule or the Muhammadan rule, there was a fairly complex and developed judicial system for the administration of justice, civil and criminal, and in accordance with defined and binding legal rules and juristic principles. There were no doubt panchayats but there were also original and appellate Courts besides. Those who are sceptical or curious may find a surprise if they read books like the recent collection of lectures delivered by one of our most distinguished lawyers Sir S. Varadachariar published under the title "The Hindu Judicial System." Those who have sometime to spare can discover very interesting material on the subject in Kane's Monumental History of the Dharma Shastra. You find in the Smritis and other text books eighteen topics of litigation or *Vyavahara padas*. I shall mention only some of them : *Rina Dana*, *Aswani Vikraya*, i.e., sale by one not the owner, *Sambhuya Samutthana* (partnership), *Samvid Vyatikrama* (violation of contracts), *Sima Vivada* (boundary dispute), *Vak Paruṣya* and *Danda Paruṣya* (abuse and assault) non-payment of wages, non rendition of service and dispute between master and servant (*Swamipala Vivada*)-*Steya* (theft), *Sahasa* (crimes of violence), *Stree Sangrahaṇa* (adultery, kidnapping, etc.) *Stree Puruṣa Dharma* (duties of husband and wife), *dyuta samahvya* (gambling and prize-fighting), apart from well-known categories like Dayabhaga, Dattaka, Stridhana and the like. A few interesting facts relating to the rules governing law-suits, I shall now give you. A plaintiff could ask for four kinds of interlocutory orders against a defendant in certain circumstances, in the nature of injunctions and prohibitory orders with which we are familiar. The four restraints were regarding place, time, leaving jurisdiction and doing certain actions, for example, selling property or ploughing a field . In civil disputes nothing by way of court-fee was payable at the inception of a suit but after the suit was decided the debtor, in cases of suits for recovery of debts, was made to pay to the King a percentage of the amount decreed. The successful creditor also was made to pay a percentage of the amount decreed. When the debtor denied the fact of debt and the creditor succeeded in establishing it, the debtor had to pay the amount decreed to the creditor and an equal amount to the King as fine. If the plaintiff turned out to be a false claimant then he had to pay to the King as fine twice as much as the amount claimed by him.

There were elaborate rules as to adjournments. The plaintiff was expected generally to be ready with his case even on the date of the filing of the plaint. This was because he was presumed to come to Court after gathering all the material to prove his case. The defendant was allowed in some cases three or seven days for his defence and if he did not deliver the defence within the time prescribed he was punished with fine. In criminal cases, in certain matters the defendant was to make his defence at once but in other cases time might be granted at the discretion of the Court. Adjournments were more liberal in disputes about gifts, partnerships, transgression of conventions, partition of heritage, etc. Gautama prescribes immediate trial when the matter is urgent, *i.e.*, where loss or abandonment of the thing will be the result of the delay. Even the grant of a year's adjournment may be allowed if the defendant is an idiot or lunatic or if the subject of dispute and the witnesses are in a foreign country. There was provision corresponding to Order 9, rule 13, Civil Procedure Code, that if the act of God or the King prevented the defendant from making his defence, he should not be declared defeated but time should be granted to him to prove his defence. The four stages of a law-suit in those days correspond to the four stages even now obtaining. The rules of pleading were very strict. The requirements of a good plaint and of a good defence are given in great detail. There were different kinds of documentary evidence and rules of proof in respect of them. Among private documents we meet with familiar documents like *vibhaga patra*, *dana patra*, *kraya patra*, *adhana patra*, *samvit patra*, *rinalekha*, *sima patra* and *anvadhi patra*. I have mentioned all these facts only to clear away a mistaken notion that in ancient days to which reference is often made, our people were enjoying a life free of laws, courts and lawyers and that we have now fallen on evil days.

Apart from the fault of a false factual hypothesis there is also another defect in the charge. I have never been able to appreciate the consistency of persons who talk of simplifying law and going back to the panchayats, at the same time emphasising the need for establishing large-scale industries, international trade, maritime activity and similar enterprises of a most complicated nature involving necessarily adjustments of various conflicting rights and obligations. Undoubtedly the legal and judicial system today is much more complicated than it ever was but this is the inevitable result of individual and national life having become increasingly complicated and complex. To give a concrete instance, in the days when everyone in the villages had to fetch his pail of water from the well in his compound there was very little scope for the application of laws or the operation of the judicial system but today when hundreds and thousands have to depend for the water they need on municipal supply from pipes, a little study and analysis will reveal how much law is involved in the various transactions leading up to the simple matter of obtaining water to drink. The following passage from Lord Macmillan's address on " The Law and the Citizen " graphically explains the complex legal system which is involved in such simple fact of everyday life as water supply. " You rise in the morning and take your daily bath. Have you ever thought of the elaborate legal procedure which has preceded the simple operation of turning on the tap ? The water supply which you so easily take for granted has been drawn from a river or pumped from underground sources or impounded on gathering grounds miles away and brought to your home by an intricate system of pipes. Think of all the rights and the interests which have had to be dealt with before this result was achieved. Landowners may have had to be compensated for the use of their property, the rights of mill-owners and of navigation and fishing may have had to be considered, way-leaves obtained, streets opened and so on * * But this is not all ; the scheme which brings the water to every household tap has to be administered and financed and this in turn necessitates the utilisation of the vast apparatus of local government law, with its many branches, * * * * rating, inspection and the like."

Having said all this, I must also say that there is a great deal of needless complexity and cumbrous procedure which calls for reform. In the Law of Evidence there is a great scope for improvement. Even in substantive law there is need for change on account of changed outlook on legal relationships. As a great American jurist observed : " Law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change." The struggle of law has been between tradition on the one hand and progress on the other ; stability and change ; certainty and elasticity. This roughly corresponds to the conflict between law and justice. But legislation to remedy the evils and to help the country to advance on progressive lines must be undertaken after due deliberation and study of legal history in its social context. " A mere guess of politicians combined with the skill of a legal draftsman is not an adequate basis of law reform. Nor is a mere armchair analytical legal study of existing or alternative rules." There should be a preliminary exploration of social facts as a regular part of the legislative process. It is not sufficient merely to formulate rules which the politicians in power think are desirable on paper. It should be ascertained after inquiry whether such rules can be effectively enforced in the existing social and economic conditions. Otherwise legislation may result not in the promotion of welfare but in the causing of misery.

I have one suggestion to make though I am not very sanguine as to its acceptance. There should be established a separate department of government with expert personnel from outside the class of party politicians. This department must be engaged in juristic studies and social inquiries which have to precede legislation and legislation should never be the result of mere onesided lobbying. This department should be a body of experts both for long range investigation and for dealing with the day to day complaints and defects in the actual operation of the laws and

for making proposals for improvement. Of course, lawyers must find a permanent place in such a department. This device would prevent both hasty legislation as well as legislation undertaken purely on party lines.

Lawyers have indeed a great role to play in the building up of the legal theory of the future. But the lawyer cannot be too conservative. The lawyer as much as the politician and the legislator is concerned with social change. He must play his part and a leading part in social reform which is the basis of legal reform. The lawyer cannot shut his eyes to the great issues of national life. There is no escape for him into an ivory tower away from the struggles of life. He is most competently equipped to discover the flaws in existing laws and their inadequacy to fulfil the social ideals of the day. He has also ample opportunity to assist social progress by drawing the attention of the Legislature to the need for changes in the law. Professor Harold Laski has some very hard things to say about lawyers in his recent book " The American Democracy." After pointing out that the American lawyers have failed to convince the public that the legal system of the United States including its judicial institutions is adequate for the problems with which it has to deal, the learned author says : " There is still delay in the Courts ; there is still a massive uncertainty ; there is still the high cost not only of litigation, with its possibilities of appeal, but even of consultation before a case is heard in the Courts. Now, as always, the number of practising lawyers who can be aroused to an interest in legal reform remains pitifully small. * * Now, as always, the conflict over technicalities, mostly procedural, between Judge and lawyers, takes more time than is occupied by the actual evidence." In his opinion it is not possible to acquit the legal profession of a high share of responsibility for evils which quite plainly can be tackled. The difficulty mainly lies in the " apathy of the legal profession." Two tests he lays down of the influence which go to make a profession worthy of the title it claims. The first is what it does for the poor who, normally, cannot afford to avail themselves of its services at the regular fees ; and the second is the scale upon which it embarks upon the effort necessary to adjust the law to the needs of the time. And he ends with the following bitter remarks : " But I think it is no unfair judgment to say that, despite islands of interest in the great ocean of indifference, lawyers generally remain unconcerned ; they regard the public as a source of income and not as an object of obligation ; and it is especially notable that the more successful the lawyer, the less likely is he to be alert to the social relations of his profession. That is even the case where some sudden wave of public opinion searches for an adjustment in those relations. Too often, where that occurs, the successful lawyer is more likely to oppose change than to forward it."

The Madras Lawyer has always been famous for the subtlety of his intellect and the keenness of his legal acumen. These qualities should be used to assist the country on the way to progress and should not stand in its way.

I wish the Advocates of Madras and the Advocates' Association a great and glorious future.

ADDRESS BY SIR C. P. RAMASWAMI AIYAR.*

Throughout my life I have tried to remember that I am and continued to be a member of the Bar. Your Association is the foremost organisation of lawyers in the Presidency, and, I would say, it yielded in no manner to any similar organisation in this country or elsewhere. There is no part of the civilised world where they had a body of lawyers who, for acumen, subtlety and cogent reasoning and argument, could surpass, even if they equalled, the members of the Madras Bar. They had illustrious exemplars of advocacy and pleading. They had given to the world men who made law their engrossing passion. Men like Sir V. Bashyam Aiyangar and Mr. S. Srinivasa Aiyangar were passionately "addicted," if the expression could be employed, to the principles of law, their application and its minutiæ. From Sir S. Subramania Aiyar, going through the illustrious line,—Sir C. Sankaran Nair, Mr. V. Krishnaswami Aiyar, Mr. P. R. Sundara Aiyar, Mr. T. V. Seshagiri Aiyar, Mr. T. Rangachari, Sir K. Srinivasa Aiyangar and Mr. S. Srinivasa Aiyangar—they found men who shone by the impetuosity of their argumentation, men who preserved serenity and equability and calm amidst all the tribulations and trials of a forensic career, and devoted their dispassionate minds to the cold analysis of law, and sought to instruct rather than overwhelm. Men like Sir P. S. Sivaswami Aiyar, Mr. J. L. Rozario and in an earlier generation, men like Mr. A. Ramachandra Aiyar and his own father, Mr. Pattabhirama Aiyar, distinguished themselves by their coolness amidst all the difficulties of their profession. The Madras Bar had given to the world men of whom any profession might be proud. It was but fitting that in the sixtieth year of their existence, the Association took account of what had been done and also the task that yet remained to be done and began a new life full of pride, hope and aspiration. The Association had also given illustrious Judges to the Bench, not the least of whom was the Chief Justice, Mr. P. V. Rajamannar.

The subject I have chosen for my address on this occasion is *audi alteram partem*—hear the other side. I wish merely to emphasise at this juncture of national and international affairs the importance of realising and keeping in mind always that there were two sides to every question and that we must hear the other side also.

The present century appeared to be tending to an outlook radically and fundamentally different from that of earlier centuries. The political ideal of the phase we had passed through was freedom, struggle for freedom and acquisition of freedom. The phase now beginning might be said to concentrate primarily and essentially on social and economic justice rather than on freedom. With a wholly comprehensive and purposive outlook on life, it insisted on an economic minimum for each person and leisure for the ordinary man. It was "a synthetic age" in which Government, whether one liked it or not entered every phase of life, social, economic and educational, and even broadcasts, radio, amusements and entertainments. Recent controversies regarding industrial tribunals, the growth of rule-making powers which daily tended not only to be more accentuated but more comprehensive and more minute and compelling, creation of new institutions not subject to the Courts,—all these had given rise to new ways of thought and new modes of approach to different problems.

In these circumstances, it is the function and duty of lawyers to insist on the maxim, *audi alteram partem*. It was the duty of every lawyer to illustrate and exemplify that maxim. In a suggestive legal pamphlet† Mr. K. V. Krishnaswami Aiyar had said that law embodied a constant striving of the human spirit after the Right, and that there were two opposing forces contending in this connection,—one for giving even the devil his due and the other functioning as the "Devil's Advocate." Some of the greatest men of the world and the greatest champions of human freedom had been those who had striven to right injustices.

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* 16th April 1949. † (1949) 1 M.L.J. Jour. 51.

Voltaire and Emile Zola, for instance, recalled the valiant struggle of great men to vindicate those who had been unjustly condemned, unheard. There was as much necessity to-day as there ever was of being alert in this respect and of not losing sight of the maxim *audi alteram partem.*

There was always the danger of totalitarianism especially where democracies were concerned and where great bodies of men come into being and functioned. I am not referring to any one particular country or other. I am sure you have read Lord Hewarts "New Despotism", where he has traced the rule of law and what was called "administrative law" and said that the rule-making power of the Executive transcended these and he levelled very strong criticism against this method. He said that in such legislation there was an evasion of the Courts making the will or caprice of the Executive unfettered and supreme. It was not enough to rely on the press or the radio to deal with the matter and enable the other side to be heard. Political movements very often started with an emphasis on liberty. When liberty was achieved, the emphasis naturally and inexorably turned on equality. Majority rule soon became impatient of forms and ceremony which restrained or resisted its desires ; then arose talk of "breaking through red tape," plans for confiscation of property or interests without compensation, etc. Where private interest conflicted with public good, the democrat was too often apt to assert that the former would be ruthlessly dealt with. There was an insistence on the preponderant strength and will of the majority working through political forms. This insistence should not lead to unconscious enslavement so that private opinion remained unheeded, and the viewpoint of the majority for the time being alone became preponderant. Anyone who stood aloof and anyone who could not show that he was working for the good of the majority,—the good of the majority always being called the good of humanity at large—was apt to be condemned. The result was intolerance of racial, religious, and political minorities and minority opinions. Democracy had come to stay and was bound to flourish. India's Government, with all their handicaps and difficulties, had shown that democracy could work here. But let us not forget that democracy flourished best on co-operative independent and fearless speaking out. The risk to be avoided—he was sure India would avoid it—was the development of conformity on one side and instinctive aggressiveness on the other. Hence the importance of law and lawyers in democracy, as well as of constitutional forms, and of an unbiassed Legislature willing to hear both sides. To hear both sides was easily said, but what was essential was to heed both sides. That was the significance and import of the expression *audi alteram partem.*

WELCOME ADDRESS TO THE CHIEF JUSTICE OF INDIA

BY

THE ADVOCATE-GENERAL OF MADRAS, MR. K. RAJAH AIYAR.*

There are certain events and occasions which remain indelibly impressed in a man's memory all through his life, and I reckon to-day's function one such. I consider it a rare privilege and honour to welcome you, Sir, the first Indian Chief Justice of India's Supreme Court to our midst to-day to preside over the Diamond Jubilee Celebrations of the Madras Advocates' Association. We, of the Madras Bar, cannot sufficiently thank you for the readiness with which you accepted our invitation, and agreed to travel all the way from Delhi at this part of the year, when summer is already holding us in its grip. We know also how precious and valuable your time just now is and how you can ill afford to spare even one day from the heavy and accumulating work of the Federal Court. But it is our good fortune that you put aside all these considerations of personal inconvenience and

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* 17th April, 1949.

otherwise and responded to our request. Your august presence has without doubt greatly enhanced the felicity and grandeur of the function, and we can assure you, Sir, that we feel greatly honoured and complimented.

This Association was born on the first of March, 1889. The foundations were laid by 24 members who may well be called the Founders of the Association; and a glance at their names is sufficient guarantee of the strength and stability of the foundation laid by them on which the present edifice has grown. We find the hallowed names of men like Sir S. Subramania Iyer, V. Krishnaswami Iyer, P. R. Sundara Iyer, V. Bashyam Iyengar, Sir P. S. Sivaswami Iyer, T. R. Ramachandra Iyer, Raja T. Rama Row, who played such a historic part in the legal life of the Presidency. The Association has grown from strength to strength and in the year 1939, the Golden Jubilee was celebrated on a grand scale; and it is with pride that I recall the fact that I was one of the Secretaries of the Association at that time. Ten years have since elapsed, and to-day we are celebrating our Diamond Jubilee. What great changes have been wrought in the history of the Globe and of India during these ten eventful years; World War No. II has been fought. The Allies have won the war and are trying to win the peace. India has fought her freedom's battle, and achieved independence under the leadership of Mahatma Gandhi, himself a member of our fraternity who, as the apostle of truth and non-violence gave a new orientation to a world groping in darkness and hate.

As our Chief Justice observed in his inaugural address, the completion of the sixtieth year in the life of an individual normally signifies the point of time, at which the glory is in the retrospect and not the prospect, but in the case of an institution, the achievement of the past three score years only render the present pregnant with possibilities of a more glorious and useful future, and the charms of the prospect are not less than the retrospect; and I have no doubt that the same will be true in the case of Madras Advocates' Association. Let me hope that the gentleman who then welcomes the President of the day, will recall these words of mine and say that my prophecy has come true.

It is an acknowledged fact that Madras has in the past produced lawyers of great distinction and renown who have left their mark, not merely in the field of law, but also in the political history of the country. We, of Madras, can justly claim with a feeling of pride that the vakils as we were then known, had established their ascendency over the English Barristers much earlier than the other Presidencies; and that with notable exceptions like Mr. Eardly Norton and Nugent Grant, it was a rare thing to find English Barristers making successful headway as against the giants of the Bar of the type of Sir V. Bhashyam Iyengar and those who followed him. Our Presidency has sometimes been dubbed a "benighted one," our soldiers have been classed as non-martial, and in the landscape of India, we occupy a southern corner; and occasionally we feel that in the clash and conflict of interests which centre round the distant capital of India, the Province of Madras is not given its proper place. But all that we can say is that Madras has amply proved itself capable of holding its own, whether in the field of battle or in the field of law or in the Councils of the Nation.

I believe we can justly claim that our Advocates' Association is the oldest and the largest of its kind in India. I do not know if other Presidencies can boast, either of such a long record of existence or of such a large number of members. Beginning from 24 in 1889 we are now 700 strong; we have spread ourselves out into two spacious floors of the High Court in its western wing and yet we find the accommodation insufficient. We may also mention to you, Sir, that in our Presidency, we have another body called the Provincial Bar Federation which is a Federation of all the Bar Associations of the Province including the Advocates' Association, Madras and which, since its inauguration in the year 1945, has been functioning successfully, organising Lawyers' Conferences each year and doing useful work.

You, Sir, are coming from a Court to which we turn our eyes for our inspiration and guidance. Ere long, the Federal Court will evolve into and become the Supreme Court and the Final Court of Appeal and the Privy Council will become a thing of the past. I remember to have read a story somewhere—whether it is true or not, I do not know—of how in the days long gone by, the villagers of some place in Northern India set up an idol of the Privy Council and were worshipping it and celebrating a festival, because the Privy Council had rendered a just decision in some sensational matter. There is no doubt that the Privy Council has had a halo and an enchantment about it not due wholly, as the old adage has it, that distance lends enchantment to the view ; and we look to the Supreme Court to continue the traditions established by the Privy Council, and be to India what the Supreme Court has been to America. It is only the other day that Mr. Anthony Eden on his return to England from his tour of India remarked that it might be asked what legacy Britain had left to India, but that history would bear out that England's greatest contributions to India was the Parliamentary system and the legal system. I have little doubt that the vast majority of those assembled here will accept and endorse the justice of the claim. I do not wish to be understood as implying in the least that Ancient India had not its own legal system, nor do I wish to be understood as saying that the English system represents the acme of perfection. But the English judicial system does stand a comparison with other systems in the world and has the virtue of elasticity and adaptability so as to keep in tune with the changing conditions of modern life and the demands of the new social order. I do not deny that it has its own shortcomings and defects. This is neither the occasion nor the place for me to dilate upon them, but I have every faith and hope that our great leaders, judges and lawyers can take the best of the systems of the world and fashion out a system eminently suited to the genius, tradition and outlook of this great land and representing a happy synthesis of the East and the West. Legislators, Judges and Lawyers should co-operate in the direction of bringing about this reform and should not move in proud isolation. Some agency must be found to mediate as it were between them. The duty must be cast by the Legislature on some group of men who will watch the law in action, observe the manner of its functioning and report the changes needed. Since 1924, Bodies called the Judicial Councils have been established in America ; and in England there has been the Law Reform Commission. Our Chief Justice has in his address indicated the lines on which action might be taken in this country.

We have followed with great interest your utterances in other places regarding the independence of the Judiciary. Such independence is not the interest of any mere faction or party or of any individual ; but the common interest of every citizen of India. Independent India should do all it can to foster and encourage an independent Judiciary. The confidence which the people have in the Courts of Justice in the land is the one solid foundation on which the real liberty of the individual can ultimately rest. The freedom of thought and of speech which modern democracy is fighting for against the dark forces of Fascism or Communism would be a mockery if there were no Courts in the land to uphold and vindicate such freedom and without the aid of an independent Judiciary, the chapter on Fundamenal Rights may well prove an ineffective charter.

The separation of the Executive from the Judiciary is perhaps as important as the independence of the Judiciary. The soundness of the doctrine in theory has always been accepted ; but the application of it in practice has been deferred from time to time for one reason or another. The Government of Madras appointed a Committee as early as 1945 of which I was the Chairman and a scheme was eventually got ready ; and the public have been eagerly expecting that it would be put into force. I see that some of the other Provinces have also taken up the matter on hand.

We are on the eve of vast changes fraught with momentous possibilities. The political map of India is being reshaped in a manner which the boldest amongst

us did not dream of as within the realms of possibility even a year back. What, with all their arms, the Rulers of India could not achieve in the past, the dynamic personality of the Deputy Prime Minister has achieved. We have heard of the saying that the pen is mightier than the sword, but here we see a new force which has achieved more than either the pen or the sword. States, big and small alike, are wholeheartedly and cheerfully merging themselves and integrating into a common India, and renouncing the symbols of their personal sovereignty in the large interests of the nation as a whole. This is just as it should be. Nations have begun to realise that it is only in collective security that the safety of the individual State lies. The Atlantic pact is the latest instance of this growing realisation. Similarly in our country, people have begun to realise that, beset, as we are with hostile elements within and without, the need of the hour is integration and not disintegration. Ten years back it was impossible to bring the contemplated Federation into existence and three years ago, it was thought that only three subjects could be common to the Indian Union and the States. Now, however, the picture has changed; and I venture to say that the day is not far distant when India will have a common Bar, common laws (subject only to minimum local variations) and a Central Supreme Court whose writ shall run through the entire length and breadth of India. It may be that for some time to come, loud and indignant voices would be heard from several quarters, striking a dissentient note which, if followed, would tend to destroy that unity, I am envisaging. I am referring, for example, to the controversy over the language of the Courts which, if adopted in the diverse ways in which suggestions have been made, might well result in a babel of tongues in the Courts of the land. One is not certain whether some of the tendencies of the present day are not the result of a feeling that freedom from British Imperialism is not complete without forswearing everything that belongs to or savours of the West. But I venture to feel that when the complex dies down, we will do everything to maintain the majesty of the law, the dignity of the Courts and the independence of the Judiciary.

I feel, Sir, that the time has come for the establishment of an All-India Bar. The Madras Provincial Lawyers' Conference which met during Christmas week, unanimously decided that steps should be taken to constitute an All-India Bar. The idea is that there should be a unified Bar for the whole of India, members being enrolled by a central organisation and allowed to practice in all the Courts in the country and subject to the disciplinary jurisdiction of the central body to be constituted. It is unnecessary for me to dwell at length on the advantages of having an All-India Bar, now that the Supreme Court as the final Court of Appeal will be established under the Constitution. I may incidentally refer to some anomalies which exist at present and which can be removed only by constituting an All-India Bar. For instance, a member enrolled in the Federal Court is competent and allowed to appear in a case before the Federal Court arising from any Province, say Bombay or Madras, but such member is however precluded from appearing in the High Court in which he is not enrolled. The position of an Advocate of the Federal Court is therefore anomalous. While he is permitted to appear in the highest tribunal of the land, he is precluded from appearing in one of the Courts subordinate thereto.

The absence of an All-India Bar has affected the position of the members of the legal profession in the International field though the Prime Minister of India has otherwise established a leading place for India in the International Sphere.

The question of having an All-India Bar on a model of the General Council of the Bar in England is linked up with such matters as amendment of the Indian Bar Councils Act, prescribing uniform standards of legal education throughout the country also framing uniform rules for disciplinary action and adopting a uniform and simplified dress suited to the climate and conditions of this country. These matters will have to be considered by the representatives of the profession from all the Provinces of India as well as by Judges and politicians.

The brotherhood of the Bar must not be circumscribed by any parochial considerations or geographical limits. It must transcend all considerations of Provincialism and vested interests. I believe that an All-India Bar will be one of the most potent factors in consolidating the national life of India and promoting uniformity of law and the administration of justice; and I would appeal to you, Sir, to throw in the weight of your great influence in the direction of bringing into existence an All-India Bar.

We, in Madras, are very fortunate in having as our Chief Justice one who is imbued with the highest ideals and who by his example has demonstrated that the interests of the Bench and of the Bar are identical. While on the Bench, he is yet in the Bar. We are indebted to him for several ideas which he gave us in connection with this very function and for allowing us to celebrate the Jubilee in the High Court, and in front of the statue of Sir T. Muthuswami Iyer, our first great Indian Judge.

Once again I thank you for your presence in our midst to-day. We wish you had seen our High Court in action, its long corridors buzzing with activity but in life we do not always get all that we wish for.

ADDRESS BY THE HON'BLE SIR HARILAL J. KANIA, CHIEF JUSTICE OF INDIA.*

I consider it a privilege to be invited to address this gathering on the occasion of the Diamond Jubilee celebrations of the Madras Advocates' Association. The Association was started in the eighties of the last century and has attained the mature age of sixty years. It is opportune to review its work and make up the deficiencies, if any. The experience of sixty years should be utilised for the betterment of the Association and the members of the legal profession.

As this Association has been registered under the Literary and Scientific Society Registration Act, unlike unregistered associations, its objects are not vague. They are declared to be to maintain a high standard of professional conduct, to protect and promote the interests of Vakils, to make representations to the authorities on matters affecting the profession and to form and maintain a library. With your steady efforts I notice that you have brought into existence a good library for you. From early times, the Vakils here have enjoyed substantial rights and privileges. Their position has generally been more advantageous than the pleaders of Calcutta and Bombay. For this credit must go to the authors of the rules framed for the admission of the Vakils on the rolls of the Madras High Court. For many years they have been entitled to plead and act on the original and appellate sides of the Court. On the abolition of the Sudder Courts, when the High Court was established, they had to compete with the European members of the Bar. In order that legal talent may be sufficiently equipped, the qualifications laid down in the rules for admission as a Vakil provided for their training in an Advocate's chamber. Those provisions showed great wisdom. Instead of a raw law graduate starting practice at the Bar and being pitched against a trained and experienced lawyer, the rules, in addition to the book learning and the passing of an examination, thus compelled the man to undergo a practical training. This was planned to make him a practical and astute lawyer, if he possessed the necessary qualities. Till recently only a few careers were open to a young man in India. Law was therefore taken up as a career by many young men and the profession is therefore naturally over-crowded. The desire to earn money, soon after enrolment as a Vakil, perhaps due to the necessities of life, makes several law graduates start practice without gaining practical experience in the office of a senior. One regrets the fate of such lawyers because without experience they are bound to fail.

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*17th April 1949.

in most cases. This will naturally dishearten them because they will realise their mistakes and shortcomings after their failure and will, in effect, be hurt more because clients will not come to them. In the profession, it is obvious that the rule of the survival of the fittest is always operative. The Bar attracts an average person because of the large income earned by people at the top. It is not realised that people at the top could be counted on one's finger-ends and contrasted with that number, those who do not earn sufficient to pay even income-tax are far more numerous. The necessity of acquiring experience under a senior cannot be emphasised too much. Omission to work in that way generally prevents a young lawyer from getting practical experience because who will brief a junior if he has the option to get a senior? It is only by working in the chambers of a senior that a junior lawyer gets an opportunity, when a senior is unable to attend, to conduct a case and show his true mettle.

One of the main objects of the Association is to maintain a high standard of professional conduct. In my opinion, that conduct consists in following three cardinal principles, *viz.*, (1) Be true to yourself; (2) Be true to your client; and (3) Be true to the Court. The first principle is a duty to yourself and your own conscience. After collecting all the material and relevant facts from your client you must remember that while in the conduct of a litigation you are the mouthpiece of the client, no one has a right to ask you to do a thing which is wrong in law. No law in the technical or moral sense of the word compels you to act against your own conscience. The second principle is based on the honesty of purpose of the profession. If after collecting materials for the case from the client you find that the client is not likely to succeed, it is your duty to convey that opinion to your client, irrespective of the question whether the client will employ you or not. In that way you save men from wasteful litigation which may ruin them. It is possible that some clients may not like or appreciate your advice and will leave you. Do not be afraid of that. The same clients, or their friends, after failing in the litigation, will realise the value of your advice, and come to you, if they have another litigation. The third principle is founded on the basic fact that you are an integral part in the administration of law and justice. You owe a duty to the Court to put the facts correctly and honestly and not with a view to misguide or mislead it. Mostly even if an attempt is made to act otherwise, it will fail. In any event if you ignore this principle you will have hardly any reputation among your colleagues and no respect of the Court. Never try to mislead the Court by propounding a proposition of law, which you know is wrong. It is your duty to help the Court in arriving at a *just* conclusion according to the law of the land. Lack of appreciation of this code of conduct has been more frequently noticed recently. I am sure the members of your Association appreciate the value of this standard of professional conduct and strive to live up to it.

The ambition to establish one Bar for India is natural. If individual selfishness and group intrigues are avoided, it will be possible for you, in the first instance, to have a unified Bar in the Province. If each Province in the country takes that as the first step towards unification, the attainment of one Bar for the whole of India will not be difficult. It is not necessary for the Provincial Bars to be completely eliminated. Local problems are bound to exist but in respect of questions affecting the profession as a whole there can and should be no objection to a unified Bar for India.

The question of the language of the Courts has been raised since India got its independence. If India is to be one, it is natural to expect it to have one common language. Let that be decided first by the collective will of the people. In doing so, adjustments will have to be made by some for the common benefit of the whole of India. It should be remembered that law is a technical subject and for years we have been thinking of questions of law and arguing cases in English. Our Statute law is largely based on English Statutes. It will therefore not be easy to find at once appropriate words and expressions in the selected new language Moreover, if such words can be found or are newly coined, it will be necessary.

for the lawyers to be fully familiar with them. It is also necessary for the people at large to be familiar with such terms and expressions. You will appreciate that in making contracts or in making wills, which are, if I may say, events of common occurrence in the lives of people, if they are not familiar with the terminology of the new language, they are likely to make mistakes through no fault of theirs, but because they are expressing their thoughts in a new language. My suggestion therefore has been that the beginning should be made in the schools to teach the new language. The work of translating the Acts of the Legislatures can be undertaken at the same time. Most probably doing all this will require a decade or two. A change-over to a new language cannot be worked overnight. The problem is not acute and if we want to avoid inconveniences this is not a sphere in which impatience can pay. Once the progress is made in the manner suggested by me, the change-over to the new language will come without effort, inconvenience or harm to anyone.

The Province of Madras has produced erudite lawyers with good practice at the Bar and the profession has given to the High Court several great Judges. A clear exposition of the principles of law is often noticed in the reports of their judgments. Judges of this Court have been selected to adorn the Judicial Committee of the Privy Council and have been appointed to the Federal Court also. Your contribution in the field of politics is also not negligible. The Province is known for its simplicity of life and habits. I cannot however help observing that for some time past the Province is in the turmoil of party politics which prevents a stable outlook and steady progress. The controversy of dividing the Province into linguistic Provinces is well known. Provincial jealousies, with a view to acquire power and positions of advantage in the administration of the country, have become more visible. I am sure the right thinking lawyers of the Province do not encourage such petty-mindedness. You have many Associations of lawyers in the different parts of the Province. There is a general movement to create one Bar in India and to eliminate distinctions between lawyers of different Provinces. The record of the last two World Wars shows that it is difficult for small entities to exist independently of others. The world is moving for its safety and peace towards unification and not towards decentralization or division. Madras has been administered for a long time past as one Province. I have no quarrel with persons, who desire to develop different areas according to their culture, art and education. I must point out that the creation of small Provinces means more governors, ministers and public servants responsible for the life, safety and betterment of the people. That causes a considerable strain on the resources of the Province. I am not concerned with politics. I am interested only in the proper administration of law and justice and it seems that the creation of small Provinces, which can afford only small remuneration to their officers, makes it difficult for those Provinces to get efficient judges. If you want to keep the fountain of justice unpolluted, you want judges who are independent and whose integrity cannot be questioned. You will appreciate that to persuade learned lawyers with good practice, to give up the profession and accept judgeships, the emoluments of the office should be at least such that they provide the ordinary daily needs of a man of that social position, without seeking any favours. It is from that point of view only that I have drawn your attention to this topic.

When the new Constitution is about to be framed the question of the independence of the Judiciary is bound to be in the forefront of all right thinking intelligent men. The government of a country has three limbs—the Legislative, the Executive and the Judiciary. Each has its own activities and functions separately carved out. Each however forms an integral part of the whole. There is no fundamental conflict between each of them. However, as each of them has to perform its functions in their respective defined spheres, the independence of one from the other is natural to be expected. The Legislature frames the laws. The Executive government has to carry on the government according to the laws prescribed by the Legislature. In the event of a question arising whether certain

acts of the Executive are within the law or not, an independent authority has to decide it. That is the function of the Judiciary. It is natural to expect that the authority, which has to decide the dispute, cannot and should not be under the control of, or be in a condition to be influenced by, either of the disputing parties. If that authority is under the control of either, a natural apprehension about the impartiality of the decision must arise. While a judicial officer does not object to his functions and duties being defined by a Statute, he naturally wishes that in performing his duties and in arriving at his decisions, it should not even be possible to suggest that any decision is likely to be influenced, because the judicial authority has to depend for its existence or emoluments on the wishes and pleasure of the executive authority. The independence of India means the independence of its people and that independence can remain only if law is respected not only by the individual citizens but by the State which means the citizens in the collective sense. It has been the experience of all to whom adult franchise has been given that the Judiciary should be independent. Without the independence of the Judiciary (*i.e.*, those who administer the law) it is thus recognised that the liberty of the citizen cannot be adequately safeguarded. If you want the Judiciary to remain independent of the executive control, it is obvious that no executive officer should be in a position to grant or refuse favours to the judicial officer. Let the judicial officers' qualifications, the terms of their service and their position on retirement be clearly defined so that they are not liable to be increased or decreased at the will of the executive. It should be the effort of persons, who are responsible for framing the new Constitution, as also of persons who are interested in preserving the liberty of the citizen, that this independence is unshakably and unequivocally provided for in the Constitution Act. This is a question of principle and not a question of persons for the time being in charge of the executive government. Along with you all I hope and trust that the oft-repeated public statements of politicians of all classes to keep the Judiciary independent and free from the executive will not remain in words only but will be translated into action in the Constitution Act. I hope and trust that the Provincial governments in their zeal for economy will not treat the Subordinate Judiciary, who have suffered because they have not been turbulent and vocal in their demands but have stood on their dignity and independence, as poor relations or the proverbial step-children.

I think it is not out of place to draw the attention of this and other Lawyers' Associations to one class of work, which is very useful but to which adequate attention has not been given. The laws in India have been modelled on the English Statutes. Even the laws of procedure are largely adopted from the procedure of English Courts. When, as a result of experience or some judgments, defects in drafting or deficiencies in the structure of the legislation are found, the British Parliament has amended their laws. In India, however, for many years, nay decades, amendments are not made in the Acts of the Legislature. This is very unsatisfactory and, if sufficient care is not taken, likely to lead to an incorrect decision of cases. It is, I think, the proper function of a Lawyers' Association to notice such amendments, when made in England, and if, on proper consideration, found necessary or suitable to the people of India, to draw the attention of the authorities to do the needful. Sometimes you will get a poor response. Do not be discouraged. Repeat your views till you succeed. You can canvass public opinion and the authorities are bound to listen. By doing this you keep your knowledge of law fresh, avoid the dryness of the study of the statute law and reap benefit from the experience of others. Moreover this will make you familiar with the objects and reasons for enacting the different sections and for their amendments, all of which is very useful to understand and appreciate the true meaning of the legislation.

With the merger of numerous States in the Union of India and with the abolition of the Zemindari system in several Provinces, the practice of the lawyers will be affected for some time. To secure a lucrative practice is not however the *summum bonum* of a lawyer's life. It is not the primary purpose of his career. The world

is torn with jealousies and hatred. Claims to superiority over one's neighbours are put forth on grounds of race, culture and even colour. In such a world I know of no greater duty upon lawyers than a re-statement of man's individual worth and the fight to maintain the liberty and safety of a citizen's person and property. The equipment which the study of law has given you casts a duty on you to help the country in maintaining its independence and to allow a true democracy to work and develop. The object of the Legislature is to keep the people free, safe and independent. It is the duty of the lawyers to help in administering the law for the betterment of the society. For it is true of our profession, as it is of life itself, that the greatest boon is to have known the best and to have known it for the best. It would be an interesting enquiry to discover how many patient judges, how many inspired legislators, how many careful framers of free constitutions and how many defenders of liberties this profession has given to the various democratic states of the world and to India. In the intricacies of modern life, law tends to be the hand maiden of big business. Without law no business can thrive. Without law no society can survive. But at its best, advocacy with its honesty, its eloquence and its courage has always been on the side of the weak and the just. For law is primarily concerned with the drama of life and its essential humanity. The whole drama of man's progress from savagery to civilization is the drama of the law. His progress is the progress of law. Our quest too is the quest for truth. And if we have been concerned with the making and the enforcement of law, no group of men have done so much to see that law is not the will of the dictator but the organised will and conscience of the people, that it is not a fixed, rigid and unalterable thing but that it grows and changes—sometimes too slowly—but that it is adapted to the conscience, will and the needs of mankind. One instance of this is the legislation during the last decade, relating to the rights of women. The other is the labour legislation made in the Provinces to bring about a greater levelling of different classes of people and a more even distribution of the wealth of the country. A great Judge once stated "Because law is the will of the community it is the law or morality. The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race; the practice of it, in spite of familiar jests, tends to make good citizens and good men."

A mental survey of India, as it is, will show you that people at the top in charge of the administration and welfare of the country starting with the Governor-General including several Ministers are lawyers. They have been installed in their positions not because they have passed the law examinations but because of their training as true lawyers. We may be equally proud of the fact that the architect of the Nation, Mahatma Gandhi, was a lawyer. Starting as a small lawyer without privilege and without influence, he became the prophet of the eternal truths. A lover and seeker of peace he became one of the greatest warriors of freedom and independence. Despised sometimes for his colour and creed, and jailed often for his insistence to live according to his opinions, he stood forth in a world torn by hate as an apostle of charity and an evangelist of the unity of mankind. Ladies and Gentlemen, that is the ideal lawyer.

Law and Justice, since ancient times, have been acknowledged to be emblems of God, their voice the harmony of the world. All things in heaven and earth do them homage. The humble and poor are living under their care and the greatest and richest are not exempted from their power. Remembering all these things, cannot we lawyers be grateful for the brotherhood that springs from this common enthusiasm and the benediction of a common heritage? For no studies are more worth the pursuit than those which lead to the understanding of these eternal principles of freedom, to a determination to be for ever watchful against the destruction and to an undying hope that some day the dream of universal peace will become a reality to bless all people of the world. Till then what better endeavour, what more divine enthusiasm can there be than the maintenance and strengthening of the defences of our civilization, Law and Liberty, which are all acknowledged to be the proper work and duties of a lawyer. To-day and for many years, the

leadership of the free world is yours, not for the asking or the taking but for the giving. It is the gift of men not because of the things you have, but for the things you are. It is a gift which you cannot renounce for it is given not in patronage but in gratitude and hope by millions of simple, decent, home-loving, God-fearing, peace-seeking men and women who cherish their freedom. As a plain citizen of the land to which all of us belong, I speak with gratitude and the hope that springs therefrom because you have pledged your lives and your honour to the cause of the freedom of Independent India. I know that we have our faults, yet if the large majority of us have these ideas and ambitions in our forefront to guide our lives and to mould our character, the lawyers as a class will be considered to have done their duty by the other citizens and played their useful and patriotic part in stabilizing the independence which India has won after a great struggle. The lawyers' profession and life is thus not necessarily a lust for money or power. Equally necessary and part of such life are the sense of duty and humility in doing the work. Let not lawyers work for the assertion of rights alone. Let them approach the career in the spirit of performing duty. Let not the shortcomings or faults of some others mislead you or make you deviate from your path of duty and desire to maintain the freedom and liberty of the people. Recall the words of Rudyard Kipling :

> Grant us the strength that cannot seek
>
> In thought or deed to harm the weak
>
> That under Thee we may possess
>
> Man's strength to comfort man's distress.

The position and ambition of a lawyer can hardly be more appropriately summarised. Our country wants and must have men of honesty and integrity. Our country wants and must have men who are able and desirous of doing their duty, fearless of consequences in their struggle to maintain and stabilise the independence of India. I am confident that this Association composed of members, whose ideas of a true lawyer are of the type mentioned by me, will fulfil its duties towards the people of India. Let us all try and follow the motto of the family of His Excellency the Governor : " MANUSHYA YATNA, ISHWAR KRAPA."

Ladies and Gentlemen, I thank you for your hearty and warm welcome.

THE

MADRAS LAW JOURNAL.

I] MAY. [1949

THE LATE MR. JUSTICE YAHYA ALI.

Madras has lost one more Judge this year. The death of Mr. Yahya Ali, on the 22nd of April last, coming so soon after the death of that popular Judge, Mr. Justice V. Govindarajachari, is shocking in its suddenness. Though it was known for some time past that he was not alright, most of us never dreamt that his end was so near. A most courteous, painstaking and patient judge, he had discharged his onerous duties remarkably well and to the satisfaction of all in spite of his failing health. He had such an even and unruffled temper that it is very doubtful whether at any time he had used any harsh words at all. His judgments were invariably sound and were the result of conscientious attempts to arrive the truth and dispense fair justice. Madras has lost in him not only a good and able judge but also a perfect gentleman of great culture and learning.

REFERENCES IN THE HIGH COURT.

On the 26th of April, before the Chief Justice and other Judges, touching references were made to the passing away of Mr. Justice Yahya Ali.

Mr. V. L. Ethiraj, Public Prosecutor, Madras, in the course of his reference said :

" It is with profound sorrow that I have to bring to your Lordships' notice the sad demise of our beloved Judge, Mr. Yahya Ali. No words could properly express the sterling qualities of that eminent judge ; a keen intellect, great learning, profound human understanding and exquisite courtesy we found in that frail figure, which adorned the High Court Bench for the last four years. It can be said truly of him that he was a great Judge. I ask your Lordships to convey our most profound sympathy to the members of the bereaved family."

Mr. V. C. Gopalaratnam, associating himself on behalf of the members of the Madras Advocates' Association, with the reference made by Mr. V. L. Ethiraj, said :

" I crave your Lordships' permission to associate myself, on behalf of the members of the bar, with the reference just made before your Lordships by the learned Public Prosecutor, to the sad and untimely demise of Mr. Justice Yahya Ali, at his residence, on Friday last, the 22nd of this month. Though His Lordship was not keeping the best of health during the past one year or so, there was absolutely nothing to give us even an inkling that the malady which afflicted him was fatal,

On the depressing and sultry afternoon of Thursday, the 21st of this month, when after a very trying spell of work in Court, he rose and walked to his chambers, we little dreamt that we were seeing that beloved Judge for the last time on earth. Almost to the last prescribed minute, he sat and did his work, with a cheerfulness and sweetness, which succeeded in concealing the great physical suffering and fatigue, which he must surely have felt all through that day and left the Court with a little joke on his lips as usual. His death, following so closely on that of the late Mr. Justice Govindarajachari, has deprived our Province of yet another great and astute Judge, and made the void on the Bench of its High Court, larger and harder to fill.

Mr. Justice Yahya Ali was born in August 1893 in a respectable middle class family of Nellore and his father was a worthy gentleman who served the Nizam of Hyderabad as Assistant Secretary in the Finance Department. Endowed with more than average intelligence and industry, he quickly got through his early years of education and joined the Presidency College, Madras, from where he graduated in History and Economics in 1916. He took the Law Degree in his stride and after getting qualified as a full fledged Lawyer set up practice in his own place, Nellore, where he soon made his mark as an able and conscientious vakil. By dint of hard work and sheer merit, he attained the Public Prosecutorship and Government Pleadership of Nellore District and held those offices for a decade and more with credit and distinction. He was also at the same time, taking a prominent part in Politics, as a member of the old Legislative Council.

Some years later, a most momentous event happened in the life of the late Judge which had far reaching consequences and verily gave a new and distinct shape to his future career. He was appointed a District Judge in 1926 and his thorough and conscientious work as a District Judge, and the great popularity he won in the successive Districts to which he was posted, Cuddappah, East Godavary, Anantapur, and Madura, are too well known to need mention. In January 1942, his exceptional merits were recognised by the Central Government, who appointed him the Chairman of the Appellate Income-tax Tribunal. His work on that Tribunal not only served to equip him with a thorough and exhaustive knowledge of Income-tax Law and Procedure, but also to build up a tradition of independent and judicial outlook for that Tribunal which his successors are maintaining and enriching to this day.

In March, 1945, Mr. Yahya Ali was appointed to act as a Judge of the High Court and his advent and stay here have verily been the inevitable success which they were destined and bound to be. Within a very short time, he endeared himself to one and all, practitioners and members of the public alike, by his charming manners, and superior ability and he was finally confirmed in July, 1948.

During the tenure of his high office Mr. Justice Yahya Ali revealed an astounding degree of familiarity with a variety of subjects. He was equally at home, whether presiding in the Admission Court, or on the Criminal Bench, whether disposing of First Appeals or Original Suits ; while he liked to study and analyse precedents reported in the volumes of the Law Reports quoted before him, he always preferred to rest his decisions, if possible, on first principles and logical reasoning.

My Lords, it was mostly on the Original Side that his work lay, during the course of the last one year and more of his judicial career. It will be no exaggeration at all, if I say, and I do say it in all sincerity—that every member of the bar, practising on the Original Side, looked upon him as a kind friend and cheerful guide. He was ever-sweet and smiling, overflowing with the milk of human kindness and rarely did he speak a harsh or cruel word. He was a Judge who encouraged sobriety in statements and one more often succeeded before him by a slight understatement of his case than otherwise.

He had an inexhaustible fund of wit and subtle humour, great qualities in a Judge, which are of inestimable value in his work. Extravagant statements or

specious arguments were easily broken down by a mere witty remark or humorous gesture from him and a balanced outlook and sense of proportion would thereupon easily begin to prevail. His voice was never raised in discourtesy or anger and even the severest of his orders were passed in a tone just audible to Counsel in their seats. He was a great student of human nature and human conduct, rarely, if ever mistaken in his conclusions of fact. His tone and demeanour, invited confidences from the Counsel appearing before him, who readily made concessions in respect of their cases, which they might not have so readily made in the usual course.

He cherished the highest respect and affection for the bar and would never allow anyone to bring down its prestige or privileges. Statements made by practitioners before him were always accepted readily at face value by him and no member of the bar had occasion at any time to feel a personal grievance against him. He was generous but ever just in remunerating the Receivers and Commissioners appointed by him for the services rendered by them to the Court.

The dignity and majesty of the law ever found in him a strong and powerful champion and protector. He could never tolerate disobedience to orders of Court or light-hearted disregard of its directions. His firmness either invariably extracted the fullest repentance and reparation from the erring person, or visited on him the most deterrent punishment, in either case, completely vindicating the authority and dignity of the Court and the Law.

The late Mr. Yahya Ali was also deeply imbued with the spirit of service to his fellowmen which found scope in the earlier years of his legal career in the substantial work he did as the Chairman of the Nellore Municipality for more than one term successively. That this was possible in a place where communal tension had existed for several decades between Hindus and Muslims and where Hindus predominated very largely, only goes to show the high esteem and respect in which he was held by members of both the communities and his complete freedom from any bias or prejudice based on creed or community. He was a fervid patriot and felt and acted as an Indian first and last. He had at the same time a deep and abiding faith in God and Religion and continued to function till his death as the Mutawalli of the Teynampet Mosque in which his ancestors and family were deeply interested and in the sacred precincts of which he has found his last resting place.

By nature he was reserved and retiring and never obtruded his views or person anywhere. He disliked noise and publicity and avoided crowds but he was always sought after by his many friends and admirers who enjoyed his crisp conversation and incisive wit. He attached great value to old cherished contacts and friendships. He treated the members of the High Court staff with whom he came in contact, with a courtesy and consideration which evoked their grateful appreciation.

My Lords, by the death of Mr. Justice Yahya Ali, we have not only lost a distinguished and human Judge, but a great gentleman. We can only mourn his loss and pray to the Almighty whose inscrutable decree has taken him away from us to bestow on his pure and noble soul His Eternal Peace and everlasting Bliss.

I request Your Lordships to convey to Mrs. Yahya Ali and her family the respectful condolences of the Madras Bar in their great and irreparable loss."

REFERENCE BY HIS LORDSHIP THE CHIEF JUSTICE MR. P. V. RAJAMANNAR.

"It is a most melancholy duty that within a few months after the passing away of our brother, Mr. Justice V. Govindarajachari, we should have been compelled to meet again to-day to mourn the death of another brother, Mr. Justice Yahya Ali. Last Thursday, he sent word to me to say that he was not attending

the Judges' meeting that evening, and the next morning he sent another message to the effect that he was too indisposed to attend Court; but I never expected that anything serious would happen in the course of the day. At 6 that evening I was shocked to hear the news on the telephone that our brother had passed away. I knew him well for over 20 years, from the time he was practising at Nellore. Subsequently when he became both Government Pleader and Public Prosecutor at Nellore, I came into closer contact with him. From that time and ever since then, we were very good friends. He was hardly four years on this Bench and during that short period, he had impressed everyone as a good and able Judge.

As a Judge, Mr. Yahya Ali had inestimable qualities. He had patience, abundant commonsense and a clear grasp of the fundamental legal principles and a fine intellect. His judgments were characterised always by close reasoning and legal arguments and they had always a sense of form and good literary style. He was particularly proficient in Income-tax Law, having been President of the Income-tax Tribunal and whenever I sat with him to dispose of Income-tax cases I received considerable assistance from him. He was also equally at home in all other branches of law. In Court and outside Court, he was always a perfect gentleman, anxious to hear anyone, always courteous, balanced and considerate. He was a good and a loyal friend and had a keen sense of humour, not of the boisterous type, but of a nice and subtle character, sometimes with a trace of irony. He was a deeply cultured person—culture with the best ingredients of what I may call Moghul culture, urbanity, catholicity and instinctive love of all that was beautiful. He was very fond of Telugu poetry and he was a real *connoisseur*, a patron of learning and art. In his death, we have sustained a great loss and it will be difficult to replace him. Our heartfelt sympathies are with the members of the bereaved family. As a token of our sorrow and as a mark of respect to his memory, the Court will be closed to-day."

SECULAR STATE AND LEGISLATION.[1]

By

Mr. T. R. Venkatarama Sastri.

India is a land of many faiths. We have Hindus, Muslims, Christians, Parsis and Jews. We have Buddhists and Jains. Among the Hindus, there are many denominations, some of which desire to be counted as separate religions. There are denominations, few or many, in other religions also. Each of these sects has its own religious and charitable institutions. With these diversities, India has only two alternatives in organising itself as a State. The Hindus being the large majority of the population, however divided among themselves, India might declare itself to be a Hindu State guaranteeing protection and fair treatment to non-Hindu minorities. Or, it may declare itself to be what has been called a Secular State. Those who desire India to be a Hindu State are not a few. They urge that Pakistan has declared itself an Islamic or Shariat State promising fair treatment to non-Muslims on a similar principle. And they add, not without justification, that Hindu States have in the past been not only tolerant of other faiths but have also in many cases generously endowed them. But we have decided, wisely as it seems to me, to be a Secular State.

One may ask, what is a Secular State? A Secular State does not mean one promoting secularism or irreligion, nor one indifferent to religion. Of the U. S. A., it has been said that its deep attachment to Christianity is due to the severance of religion from State.

The words "Secular State" do not occur in the draft constitution. Nor do they occur in any other of the world's constitutions, as far as I know. The

1. Radio talk published by the courtesy of the All India Radio, Madras.

words have no fixed technical meaning. They are a compendious description of a State scrupulously maintaining a non-interfering attitude towards all religions in the State. This attitude is obvious in the finalised provisions relating to Religion in the Chapter on Fundamental Rights.

The first general provision to note is in Article 8. Existing laws, in so far as they are inconsistent with the Fundamental Rights declared, are to become void, and no future legislation can contravene them. It has a repealing effect on past legislation and a prohibitory effect on future legislation. Every Article declaratory of Rights should be read as prohibitory of legislation affecting them.

Article 19 provides that all persons shall have freedom of conscience and the right to profess, practise and propogate religion. This is enacted in all constitutions. There is to be no compulsory imposition of religion on any one. Article 20 has no corresponding provision in any other constitution. It might have been thought unnecessary in view of the right to form associations or unions, and the right to own property provided in such constitutions, as in our own Article 13. The terms of Article 20 are important:

> Every religious denomination or any section of it has the right to establish and maintain religious and charitable institutions,
>
> to manage its own affairs in religious matters,
>
> to own and acquire property, moveable and immoveable, and
>
> to administer such property in accordance with law.

This Article provides autonomy to each sect in the administration of its endowments. The only limitation on its autonomy, if it could be called a limitation, is to be found in the words "in accordance with law." They imply no doubt that there is a body of laws regulating the management of these public or private trusts. General principles similar to those embodied in the Indian Trusts Act, and principles applied by the Courts of Equity and the usages of institutions govern their management. The Sovereign is protector of all charities. The Advocate-General as representing him can institute a suit to rectify mismanagement either by having the trustee removed and new trustees appointed, or by having a scheme framed for the management of the Trust. Or, two beneficiaries with his sanction may institute such a suit the conduct of which he may assume at any time. The Hindu Religious Endowments Act has substituted the Board of Commissioners for the Advocate-General as regards Hindu Religious Endowments. So far, the jurisdiction of the Civil Courts has not been very seriously curtailed.

In this connection, there are two reservations of power to the Legislature which must be noted. Legislative power is reserved to regulate or restrict the economic, financial, political and other secular activity associated with religious practices. This relates to institutions which carry on business or money-lending and has no relation to the management of trust properties. Sikhism which has a militant origin has connection with politics and Sikhs recently claimed the right to hold political meetings in the Gurudwaras. Such activities cannot escape regulation or restriction, sheltering behind religion. The other reservation is in regard to social welfare and reform. Throwing open public institutions to all classes which is an item of reform has been specifically mentioned on account of its importance. This does not touch Article 20. These reservations are in themselves an indication that the autonomy in respect of the administration of trust properties is not limited except by what is implied by the words "in accordance with law."

Article 20 is general and applies to all religious denominations. What the Legislature cannot do in the case of one denomination, it cannot do in the case of any other,

In this connection, Article 22 may also be considered. It relates to religious instruction in educational institutions. In Government institutions there is to be no religious instruction. But if they administer institutions created by private endowments, they scrupulously respect the donor's direction as to religious instruction. In State-aided institutions, compulsory attendance at religious instruction should not be enforced. In private unaided institutions, the student must submit to their conditions, or not join them at all.

It is not my thesis that the Legislature cannot make laws in relation to these trusts. There may be legislation such as we have in a great part of the Hindu Religious Endowments Act, and in section 92 of the Civil Procedure Code. But the question is whether the Government can take over the religious institutions of all or of any of the communities through or under a department of State. I hold that a department of Government cannot be authorised to take over the management or direct supervision of religious charities. In a Secular State, the ministers may be of different religions. The ministry may include persons with no religious faith at all. The discussion in connection with the Hindu Religious Endowments Bill showed that there were some who were frankly for the destruction of these institutions, and appreciated the Bill as going some way in that direction. That men with anti-religious views should dominate the Government is not beyond the bounds of possibility. There is this difference between the Judiciary and the Executive Government. The Judiciary who administer laws need not be of the denomination of the litigant and may belong even to another religion. Their decisions are subject to appeal. A final Court, the members of which do not belong to the religion of the litigant, may even be appreciated for its impartial approach to the case. But the Executive Government, consisting of people of diverse faiths, whose orders are not subject to appeal to any higher tribunal, cannot assume the management of religious trusts. Either a Secular State means that or it means nothing. To some of those in authority, it means nothing at all, and no limitation of legislative or direct governmental interference is intended by it. Nobody suggests that the Government should helplessly watch the mismanagement of trusts going on under their very eyes. There is their Advocate-General to take steps against mismanagement of religious institutions and their endowments, to whichever community the trusts belong. The setting up of any new agency for taking action when necessary is open to no objection.

The real trouble is that the Executive Government seem to feel that they are as good at deciding any matter impartially as the Courts and there is no need for Courts to examine their action and its legal propriety. They seem sometimes to feel that the Courts are a hindrance in the way of their beneficence. It was only the other day that the Chief Justice of India expounded the relative functions of the legislative, the Executive and the Judicial authorities of the State.

Let us take the Cypres doctrine as now applied to public trusts. " Cypres " has lost its meaning in the mind of the Executive Government. They take all public endowments to be for the benefit of the people and hold that there is no harm in diverting endowments to any new item of public good. Then " Cypres ", which means " as near as possible," loses all meaning.

England is no example to a Secular State. It has an established religion and church. The Sovereign and the Chancellor cannot embrace Catholicism and retain their places. The Parliament is a Sovereign Legislature with unlimited powers. No Fundamental Rights limit their powers. But sound policy and good sense have kept them within limits. The institution of Charity Commissioners is about a century old. At first Catholic Charities were outside their jurisdiction. Now it extends to them also. There is clear recognition that the trustees are the sole and responsible administrators of the income and are necessary for the institution of the Commissioners who are to be the judges of all dealings with the capital with supervisory powers, as in our Hindu Religious Endowments Act. Resort to courts

is not taken away there. But resort to Courts has become comparatively rare after the institution of Charity Commissioners with their quasi-judicial functions. The slow growth of tolerance has made England conform as nearly as possible to the ideal of a Secular State, even though it does not profess to be one. A State which has declared itself to be Secular cannot do what has not been done even in England.

MADRAS PREVENTION OF BLACK-MARKETING BILL.

BY

MR. T. V. RAJAGOPALAN, ADVOCATE, MADRAS.

The object of this bill is to put down black-marketing in this Province. The statement of objects and reasons mentions that despite the vigilance of the police and the official machinery, black-marketing is rampant. The reasons for this inability to put down black-marketing according to the statement are :—

1. Lack of co-operation of the public, and
2. Absence of clear definition of 'black-marketing'.

This bill therefore defines 'black-marketing' and provides for deterrent punishment in the form of imprisonment, of execution of bonds for good behaviour in the case of a second or subsequent offence, of giving wide publicity to convictions under the Act and of prohibition of offenders in certain cases from carrying on the business or any business similar to it.

No Act can successfully work without public co-operation. No one will deny help to put down black-marketing except those engaged in it. And to the extent the bill provides a deterrent punishment to the black-marketers, it will have the warm approval of the public. But punishment must not be primitively barbarous or revolting or unknown to the ordinary principles of Criminal Law. The offender who is punished in such a way will evoke deep sympathy from the public rather than the opprobrium and scorn richly deserved by him. Such punishments in some measure defeat their own object. Thus the provision for the externment of the offender, the provision for the publicity of his conviction and the provision for enforced publication in papers are novel and to say the least, crude methods of inflicting punishment on the offenders.

Section 3 (1) defines black-marketing. Section 3 (2) provides the punishment for black-marketing. The offender is to be punished by (1) imprisonment, (2) forfeiture, and (3) fine.

As regards (1) except for reasons to be recorded in writing imprisonment of not less than six months must be given and it may extend to six years. It would read better if the wording of this sub-clause is altered into 'Imprisonment for a term which may extend to six years but shall not, except for reasons stated in writing by the Court, be less than six months.'

As regards (3) the fine is unlimited. It would be advisable to fix a maximum limit or to limit it by relating it to the value of the forfeited property. That is to say, the fine may be three hundred and fifty rupees or to the value of the forfeited property whichever is higher.

Section 5 provides for a further punishment for a man who has been convicted 3 times.

Section 5 (*a*) provides that he may be prohibited from carrying on, or being concerned in any manner with any business mentioned in the order, such business being similar in its nature to any of those in relation to which he was convicted ; or he may be allowed to carry on the business only in accordance with any conditions that may be imposed for such period as may be specified. Having regard

to the fact that the punishment given on the previous two occasions has had no effect on him, he is prohibited from carrying on that business or any other similar business. The words ' Similar nature ' may not be easy of precise determination.

In the alternative, he may be externed from his place but not outside the Province under section 5 (*b*). If he is externed from his place, it may not be possible for him to carry on the business at his place but he can do so in the place to which he is externed. If he is not a fit person to carry on a business at his place, why should he be allowed to carry on the business at a new place. Externment except in cases where person's presence is likely to produce a breach of the peace or where there is any other political reason should not be provided as punishment. Section 5 (1) (*b*) must be deleted.

Section 6 and section 7 provide novel punishments. To make a man proclaim in every one of his letters particulars of his conviction is a harassing provision. This is provided in the case of a man who has been found guilty even in the first instance. Having regard to the deterrent punishment provided, this section is wholly unnecessary.

If section 6 is objectionable section 7 is more so. Newspapers can be trusted to publish press-notes by Government and fair summary reports of cases. Why provide compulsory publication. It is not known what past conduct of newspapers makes it necessary to have such a provision. This provision is needless and ought to be deleted.

These punishments are like confinement to stocks, which we have abolished as barbarous and degrading and they are more subtle and refined in their barbarity.

Section 10 provides for the punishment of the members of an association or company when a company is guilty of an offence of black-marketing. The section provides that such persons are punishable unless they prove that they had no knowledge or that they had exercised the diligence to prevent the commission of the offence. It will not be possible to prove a negative thing as " no knowledge " and it is dangerous to presume their knowledge. If on all the facts of a case the Court comes to the conclusion that any such person had knowledge, then he can be punished unless he can show that he exercised all due diligence to prevent its commission.

Section 10 should be modified as follows :—

" Where a person committing any offence punishable under the Act is a company or an association or body of persons . . . . . . every director, manager . . . . shall, if he had knowledge, be deemed guilty of such offence, unless he proves that he exercised all due diligence to prevent its commission."

Section 11 provides for the punishment of an employer where his agent or employee commits the offence. The express or implied permission mentioned in the section is only to act in his behalf and not to commit a breach of the law. The employee is of course punishable. Unless it can be proved that the employer authorised the employee to do an act which has constituted the offence or had knowledge of the transaction, he ought not to be punished at all, particularly with imprisonment.